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THE
PRINCIPLES
OF
CONVEYANCING:

INCLUDING

Dissertations

ON

I.—ESTATES: BOTH AS TO QUANTITY
AND QUALITY.

II.—COPYHOLDS, CUSTOMARY FREE-
HOLDS, AND ANCIENT DEMESNES.

III.—USES, TRUSTS, AND POWERS.

IV.—TITLE: ABSTRACTS OF TITLE,
AND REGISTRATION.

WITH

COPYHOLD FORMS AND PRECEDENTS,
AND A COPIOUS INDEX.

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To the successful Practice of Conveyancing, two things are indispensible:—1. A correct knowledge of its principles; and, 2. skilfulness in their application.

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TO THE READER.

IN detaining the reader for a moment at the opening of this book, let him not suspect a subtle apology for its appearance, or an indirect and artful eulogy of its contents: I simply desire to inform him of what he will find set down in it, lest he should enter upon its perusal with high expectation, and abandon it with frustrated hope.

The volume, then, is devoted to that branch of our national jurisprudence, denominated "CONVEYANCING," and comprehends the grand subjects which make up the scientific principles, governing the relationship that subsists between the owner and his landed property. It is divided into four Tractates, or Books, each of them complete in itself, although they have a connexion with one another, as treating of subjects common to the same science.

The first Tractate deals with the important theme of Estates in Realty, both as regards their quantity as well as their quality. It exhibits, not

only all the several interests that can be enjoyed in land according to English Law, together with their particular attributes and characteristics, but also the periods of their enjoyment, and the manner, whether sole or joint, in which they are held and occupied.

As closely connected with this fundamental enquiry, the second Tractate takes up the whole question of Copyholds, Customary Freeholds, and Ancient Demesnes, and exhibits their origin, incidents, and peculiarities of transfer, giving the minute details of the practice relating to Commutation and Enfranchisement, interspersed with the necessary forms, as well as valuable precedents of surrenders, deeds of covenants, and enfranchisements, which have been selected from drafts in actual operation.

Having developed the laws of Freeholds and Copyholds, the abstruse and important doctrines of Uses, Trusts and Powers, absorb the whole of the third Tractate, which, being sub-divided, treats of Uses and Trusts, in its first part, and attempts, in its second part, a sketch of those Powers which modify the uses of an estate.

The fourth Tractate is occupied with the vital subject of Title to Realty, in which the several methods of its acquirement are indicated,

and their learning expounded ; the latter portion of it comprehending the requisites of Abstracts of Title, their perusal and verification, together with the duties and purposes of searching for incumbrances, and the registration of judgments and deeds.

A copious table of arrangement, with figures corresponding to the text, precedes each Tractate, with a portional repetition at the heading of each chapter to which it relates ; and a full index to them all is placed at the end, to facilitate reference, and render every matter treated of accessible.

Thus, the volume contains, in fact, all the leading subjects embodying the PRINCIPLES OF CONVEYANCING. Brevity, without ambiguousness, has been the object sought to be attained ; obsolete law and exploded doctrine have been entirely discarded, while living and extant learning has been exclusively discussed. A voluminous body of valuable annotation is arranged in the notes, with authorities and treatises quoted, where the minutest details of all the salient tenets exhibited, may be found.

The reader is now invited to an examination of this volume, which I have treated after an order and style entirely my own. It has been my

endeavour to make it practical, in accordance with the Spirit of the Age. Unnecessary dissertation is not indulged in, time and space are economised, and simple results set forth.

While, indeed, every effort has been made to render the work acceptable, and at a price quite without example in an original book upon the abstruse subject of real-property-law, I am abundantly sensible that a sifting scrutiny may discover imperfections: earnestly, then, do I pray the critical student to be the friend in his strictures upon my humble labors, and to remember the great difference between conception and reality, arising from the scantiness of human intellect, and the impotency of human strength.

J. J. S. WHARTON.

36, *Lincoln's Inn Fields*,
Sept. 10, 1851.

TRACTATE I.

THE QUANTITY AND QUALITY OF ESTATES.

"The Laws of Property have been formed into a fine and artificial system, full of connections and nice dependencies ; into a system which has reason for its basis, and convenience and good policy for its objects."—PRESTON.

THE
QUANTITY AND QUALITY
OF
ESTATES.

WE have selected this as the first subject in our series of Tractates, for the reasons laid down by a great master of Conveyancing Law—the late Mr. Richard Preston—who thus pronounced his opinion by way of preface to the second edition of his elementary treatise on Estates:—"The most mature reflection, and the unerring guide of experience in the education of pupils, have brought the fullest conviction to my mind (a conviction originally impressed by the example of *Littleton*) that the knowledge of the quantity or measure of estates, ought to be with every person, anxious to become acquainted with the rules of property, either as a barrister, a conveyancer, a pleader, or a solicitor, the foundation of his studies. Every branch of the law, on Rights and Titles; on Remedies; on the power of alienation; on the modes of conveyance, &c., &c., and the forms of action concerning the title, or the right to the possession, and frequently to relief in equity, must be deduced from the previous consideration, what estate was in the person in reference to whom the material question is to be predicated."

INTRODUCTORY DEFINITIONS.

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| 1. The terms "property," "estate," and "things" explained. | 2. "Things" distributed into real, personal, and mixed. |
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So extensive and various is the relation between persons and property; so great the privileges and power, political as well as social, which wealth confers upon its possessor, that the law, expounding its principles and governing its transfer, is of universal interest. This particular law is technically called "Conveyancing;" and, like every other human acquirement, distributes itself into the Science and the Art: the science developing the theoretical plan, and systematizing the speculative principles of the subject; the Art being mechanical, and laying down ascertained rules for facilitating the method of disposition.

It will be convenient, on the threshold of our inquiry, to ascertain the technical meaning of several very general expressions.

1. The terms "property" and "estate" in their popular sense are convertible, signifying the subject of ownership, and are, therefore, coincident with "things." The law employs the word "things" in contradistinction to "persons," and intends by it to comprehend all animate and inanimate matter, save only mankind. But the exact signification of "property" is synonymous with the technical force of "estate," which means the peculiar relationship in which a person stands with regard to things, and the particular privileges possessed by such person in consequence. To the question—"What interest has a certain individual in a given thing?" the answer may use the word "estate" in the two senses, thus, "He has a free-

hold estate in the estate at Greenacre." It will be observed that "freehold estate" applies the word technically; while "estate at Greenacre" employs it popularly. The term "property" might have been substituted for "estate" with precisely the like effect.¹

2. "Things" the treatise-writers distribute into real, personal, and mixed. The characteristic of things-real, (otherwise called realty or real-property,) is that they are immovable, and cannot be transported from one place to another, such as land; things-personal, (otherwise called personalty or personal-property,)² include all movables, which can of course be carried anywhere, as goods, money,

(1) It is the practice in modern statutes to introduce a glossary clause explaining the meaning and extent of many technical words and phrases made use of in them, which words and phrases have very often in their ordinary signification, a more confined, and in many cases, a different meaning. See 13 & 14 Vict., c. 60, § 2, as to the word "land." Every considerable act of parliament thus carries its own peculiar dictionary, the effect of which is to produce doubt, confusion, and perplexity. It really becomes a very serious question whether there should not be passed a general glossarial statute, exactly defining such technical terms, by which their meaning in every subsequent act of parliament should be ascertained and interpreted. The act just passed—13 Vict., c. 21—attempts to deal with this subject; but it is meagre and inadequate, and altogether too feeble to cope with the robust evil.

(2) While the principles of realty are for the most part of feudal derivation, the rules concerning personalty are brought from the civil law, or the law of nature. Sir Robert Chambers, in his Treatise on Estates and Tenures, epitomizes the history of the Feudal System as follows:—

"The duration of the feudal law has by some writers been fancifully enough distinguished into four ages.

1. "In its infancy, the lands given to the soldiers, which were not yet called feuds, and perhaps had no general denomination, were held by the mere will and pleasure of their lord.

2. "The second age began when some regard was had to descent. It is supposed, that at first the son of a tenant was put into possession of his father's land, not as having a better right, but as being naturally more known and more favoured than a stranger. What was reasonable by degrees became customary, and when the son without any cause alleged was excluded, the lord was considered as exercising *summum jus*, as acting unkindly, though not illegally. In time the advantages of a more certain settlement were discovered, and grants were made to a tenant and his sons. These grants were however interpreted in their most literal rigour.

3. "In the third age those possessions which, while they were granted only for life, or at most with very strict limitations, had been termed *beneficia*, began to be made

and chattels personal; things mixed are evidently made up of those subjects of ownership, which possess the characteristics of both realty and personalty. They subdivide themselves into two classes :—(1), they are either fixed in contemplation of law to realty, but movable in themselves, as heir-looms, (or limbs,) title deeds, court rolls, &c., which may be denominated *quasi* realty; or, (2), they are movable in point of law, though fixed to things real, either actually as emblements (or *fructus industriales*), fixtures, &c., or fictitiously, as chattels real, leases for years, &c.: both of which kinds may be called *quasi* personalty. There is also one description of property connected with land which may be either real or personal property, depending on the terms of the statute which creates it; as canal shares, which under some acts are real property, and under others, personalty, although issuing in some respects out of land.

In dealing with estates in things—real, realty, or real-property, we propose to unfold, in the first place, their quantity; and, then, their quality.

indefinitely inheritable, and took the name of feuds. The succession to a feud was for some time strictly lineal.

“The three periods of the feudal law which have been mentioned are called its infancy, childhood, and youth.

4. “Then commenced its fourth age or maturity: the order of descent was settled, collateral relations were admitted to inheritance, the reciprocal obligations of lord and tenant were fully understood, and some princes, the first of whom was the Emperor Conrad the Second, had published edicts in writing for regulating feudal successions.*

“About a century after the Conquest the feudal law received its completion by the book *De Feudis*, now appended to the body of the civil law, and compiled in the time of Frederic the First. This book comprises some decretal epistles of popes and some edicts of emperors, with the opinions and decisions of feudal lawyers, particularly of those from whose collections it was chiefly compiled, Gerardus Niger and Obertus de Horto. This was the highest state of the feudal law, in which, like all other human things, it continued a short time, and from which it afterwards declined.”

* Craig. Feud. lib. passim.

CHAPTER I.

THE QUANTITY OF ESTATES.

- | | |
|------------------------------------|---|
| 1. What is meant by quantity. | 4. FEES, OR INHERITABLE FREEHOLDS. |
| 2. The three articles of property. | 5. The three orders of estates, and the |
| 3. Distribution of estates. | three species of the first order. |

IT must be carefully kept in mind that the word “estate” does not legally mean the land itself, which is, as we have just seen, its popular sense; but, that particular right in a certain piece of land exerciseable by its owner.³

1. The quantity of an estate signifies its time of continuance or degree of interest; as in fee, during life or for years. What is meant by quantity.

2. Estates exist in these three articles of property:— The three articles of property.
 (1) Lands; (2) Tenements; and (3) Hereditaments; which terms embody what is meant by real property in this country. Land⁴ comprehends all external, tangible, and immovable property, susceptible of manual occupation, and being part and parcel of the terrestrial globe. Tenement⁵ includes land and every modification of right connected therewith, which may be holden so as to create a tenancy, as a rent-charge, a right of common. An hereditament is an abstract term, denoting an inheritable

(3) Co. Litt., 345; Chambers on Estates, 21; 1 Preston on Estates, 20.

(4) In its confined sense it denotes arable ground only. Cruise's Dig. 4, tit. 32, c. 20.

(5) Popularly the term signifies a habitable building with its appurtenants.

succession, which can be enjoyed either in land, or in any privileges annexed to it.⁶

It may be broadly stated that the word "tenements" includes "land," and the word "hereditaments" includes both "land" and "tenements." Land, then, is both a tenement and hereditament, and a tenement may be an hereditament,⁷ but every tenement is not an hereditament, *ex. gra.*, a rent-charge for life, which is a tenement, but certainly not an hereditament. Again, an hereditament may be neither land nor tenement, as an annuity in fee. And an annuity for life is neither land, tenement, nor hereditament.

Distribution
of estates.

3. We will now proceed to consider the distribution and

(6) Burton's Comp. of Real Prop. 1. Mr. Fearn, in his "Reading on the Statute of Enrolments," (27 Hen. VIII. c. 16,) observes, "the word *hereditaments*, in our law, though applicable both to real and to personal property, applies to the two species of things in a different mode or degree of relation. When applied to things *real*, it generally denotes the things themselves which are the subjects of property, without regard to the nature or extent of property therein; but when used in relation to *personal* things, the word *hereditaments* does not import or signify the things themselves, but is only applicable to them in respect of some inheritable right, of which they are in some mode or other the subject. Of a nature in some measure intermediate between the two already noticed, there is a third application of the word *hereditaments*, wherein it is used to denote inheritable rights respecting lands, or something issuing therefrom, or exercisable therein, or having at least some local connexion or relation, separate and distinct from the enjoyment of the lands themselves. Hence we obtain the division of hereditaments into *real*, *personal*, and *mixed*. Besides this distribution, there is another general division of hereditaments into *corporeal* and *incorporeal*. The first description is confined to those subjects of property which are comprised under the denomination of *things real*. Incorporeal hereditaments are such as derive the denomination of hereditaments, not from the *things* themselves, but from the inheritable *rights* of which they are the subject: for rights are of an incorporeal nature. Incorporeal hereditaments therefore comprise the two divisions of *mixed* and *personal* hereditaments already noticed, and under the same description I would include such *real* hereditaments as consist of rights to the future enjoyment of lands, divided from the present possession; for though corporeal hereditaments are their subject, yet, whilst the rights remain distinct from the right of actual possession, I see nothing substantial in their nature; on the contrary, they seem clearly to fall within that predicament which I take to be the criterion of an *incorporeal* inheritance, *tangi non potest, nec videri*. There are also other properties common to them with other estates, which are universally arranged in the class of incorporeal inheritances; for instance, they do not lie in livery, and cannot be transferred without deed, except in some special instances, similar to some of those in which *corporeal* inheritances may be passed at common law, without livery of seisin."

(7) 1 Preston on Estates, 12.

several species of estates, pointing out (amongst other things) the technical words, by which their extent is to be marked and ascertained.

Estates, as to their quantity or time of continuance, are distributed into two classes :—(1) Freeholds and (2) Chattel-Interests. The distinction between these two classes of estates is that freeholds⁸ endure for the period of a life at least;⁹ while estates for a shorter period than life are fixed for a more certain time than life, since these are defined by a certain number of years, months, or days, and are, therefore, deemed chattel-interests.¹⁰

An estate for life is called a mere freehold, it determines with the death of the life upon which it depends for subsistence; but a freehold may be limited to endure not only for the life of a given person, but also for the life of his heirs or successors; it then becomes an inheritable estate, or interest enjoyable by the heirs of the owner after his death.

4. An inheritable freehold is more ample than a mere freehold, for it not only comprises all the time of this estate, but something more, as it is transmissible to certain persons designated as the heirs or successors of the owner after his decease, and may continue for ever. These inheritable freeholds are distinguished by the name of fee, the better to separate them from mere freeholds, which are otherwise denominated life or non-inheritable freeholds.

Fees, or
Inheritable
Freeholds.

5. We deduce, then, from these differences three distinct orders of estates, viz. :—

(1.) Fees or Inheritable freeholds.

The three
orders of es-
tates, and the
three species
of the first
order.

(8) Freehold is a term of art which denoted, in former times, the *quality* of the estate, as indefeasible at the mere will or caprice of the lord, whenever he should think proper to exercise the one or signify the other. 1 Preston on Estates, c. II. It is the translation of the phrase—*liberum tenementum*.

(9) But they may be made to end sooner by the happening of an uncertain event, the breach of a condition, &c.

(10) These interests are called tacks in Scotland. Erskine's Prin., 2 lib., p. 172.

(2.) Life-freeholds.

(3.) Chattel-interests.

Under these orders rank several sorts or species of estates.

The first order of FEES, OR INHERITABLE FREEHOLDS, comprehends in modern times three species of estates, called

(a) Fee-simple absolute ;

(b) Fee-tail ;

(c) Fee-qualified or base.

It will be collected then that “fee” used in this sense is a general term, which is particularized by certain adjectives, as simple, tail, qualified, &c. In other words, “fee” expresses the *genus* of inheritable estates, and the epithets point out their *species*.

§ 1 (a). *Fee Simple Absolute.*

1. Its description.

2. How created.

3. The word that passes the estate in deeds.

4. As to wills.

5. Incidents of a fee-simple.

Its description.

1. This interest stands at the head of estates as the highest in dignity and the most ample in extent; since every other kind of estate is derivable out of a fee-simple, and is ultimately absorbed into it.

A fee-simple is pure, without condition, and unrestrained, except by the laws of escheat,¹¹ and the canons of real-property descent. It is not, however, confined to

(11) Noy, in his Treatise on Tenures, p. 65, says—“This estate can never perish, so long as the *substance*, whereof the estate ariseth, hath a being. And, therefore, albeit that he which is seised of such estate, happen to die without heir, yet the *same* estate is not extinguished, but, by act in law, in some other degree, transferred to the lord of whom the lands were holden, by way of escheat; because the land, wherein the tenant hath such estate, doth still continue. But, if a man seised in fee of a rent-charge or rent-seck, dieth without heir, this fee-simple, although it be of the first sort, doth perish; because the rent, wherein he hath estate, being transitory, is, by such dying without heir, quite swallowed up and drowned in the land out of which it did issue.”

any particular line or species of heirs, but descends to the owner's heirs general, whether lineal or collateral, paternal or maternal.

Littleton, in his *Tenures* (§ 1), gives a description of this estate, which appears to have been adopted by every subsequent writer. His language is this:—

A person who holds “in fee simple is he which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin *feodum simplex*; for *feodum* is the same that inheritance is, and *simplex* is as much as to say lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. For if a man would purchase lands or tenements in fee simple it behoveth him to have these words in his purchase, to have and to hold to him and to his heires: for these words (his heires) make the estate of inheritance. For if a man purchase lands to have and to hold to him for ever; or by these words, to have and to hold to him and his assignes for ever: in these two cases he hath but an estate for term of life, for that there lack these words (his heires), which words only make an estate of inheritance in all” transfers, *inter vivos*.

2. This estate is created by agreement or act of parties, How created. which is evidenced either by a deed or a will.

3. In a deed the word “heirs” is so absolutely necessary The word that passes the estate in deeds. to constitute a fee or inheritable estate, that not even a synonymous term, nor any periphrasis or circumlocution, will have that effect, how clear soever the intent of the parties using such language may be.¹² The common law adopted this strict and necessary rule to avoid uncer-

(12) In the following cases, a fee-simple passes without the word “heirs:” (1) By creation of nobility *by writ*, which of itself ennobles the blood to a man and his lineal heirs, unless the writ otherwise limits it; but the creation of nobility *by patent* gives no inheritance without proper words. (2) In gifts that take effect by reference; as if A give land to B and his heirs, and then B grant to A, as fully as A had before granted to him.—*Chambers on Estates*, 31.

tainty,—the mother of contention. And so far has this prescriptive rule been carried that the word “heirs” in the plural number was held by Lord Coke ¹³ essential, and a conveyance to A and his “heir” in the singular number, vested in A a life-freehold only ; because it was contended the heir cannot take a fee-simple by descent, as he is but one, and therefore, in such case, cannot take anything. But the term “heir” is a *nomen collectivum*, operating similarly as heirs in the plural number. Perhaps a limitation to A and his *heir* would be ruled by the Courts, in the present day, as conveying a fee simple.¹⁴

In practice the phrase universally adopted in deeds, in order to transfer a fee-simple absolute is—“to A, his heirs and assigns, for ever.”

The word “assigns” is not material, and may be omitted, for it gives no other privilege to the owner than that which the law itself confers upon him by virtue of his estate, as entitling him to alien or transfer it ; and the phrase “for ever” being but declaratory of the time during which the property shall be enjoyed, may also be omitted in the conveyance.

It must be remarked that the word “successors” is the proper term to be used in transfers to corporations sole, it corresponding to the word “heirs.” In every conveyance then of a fee-simple or perpetual estate to a bishop, rector, or any other corporation sole other than the Queen, the word “successors” is as necessary as the word “heirs” in a grant to a private person. But in transfers to the Queen or to corporations aggregate, as the head and fellows of a college, a dean and chapter, the mayor and commonalty of a city, &c., neither “successors” nor “heirs,” nor any other word of perpetuity is requisite,

(13) Co. Litt., 9, a.

(14) *Dubber*, dem. *Trollope v. Trollope*, Amb. 453. See, however, *Bayley v. Morris*, 4 Ves. 794. The word “heir” in the singular number only is a word of purchase, and not of limitation.—Gilbert on Uses, p. 24.

because they never die as such, but enjoy a kind of legal immortality.

4. This stern and inflexible rule is now wisely confined As to wills. to formal deeds, which are duly deliberated upon and weighed as to the precise and technical effect of the language inserted in them, before they are executed by the parties thereto. In wills, however, which are frequently written and signed, without counsel and without proper deliberation, and often during an unanticipated malady, and amidst the consternation of a sick-chamber, where Death is fast embracing its victim, the law relaxes this iron principle, declaring (1 Vict., c. 26, § 28) “that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had the power to dispose of by will in such real estate, *unless* a contrary intention should appear by the will.”

It will be advisable, notwithstanding this wholesome statutable provision, to introduce into wills, more especially when they are prepared by a professional man, the technical words, which are absolutely indispensable in the case of deeds, so as to express with certainty the testator's intention respecting the quantity of estate which he desires shall be devised.

5. The most prominent attributes or incidents of this estate are the following:— Incidents of a fee-simple.

(1.) An unlimited power of alienation, whether by deed, gift, or will.

(2.) If the owner die intestate, it descends to his heirs general, male or female, lineal or collateral, according to the canons as settled by 3 & 4 Wm. IV., c. 106, except the estate be subject to gavelkind, borough-English, or

copyhold customs, when the particular custom vacates the general law.

(3.) It is subject to the curtesy of a husband, and the dower of a wife, as the case may be, provided the right of the former be consummated by the necessary stipulations having been perfected, or that of the latter have not been barred.

(4.) The owner has an uncontrollable power of waste over it.

(5.) It is liable to all the owner's debts.¹⁵

(15) As to crown debts, the estate is liable thereto, into whose hands soever it passes, unless there have been the proper discharge or *quietus* from the Exchequer.

As to debts owing to subjects, it is to be observed that this estate was originally liable in the heir's hands only for the ancestor's specialty debts (*i. e.*, debts under seal, as a bond, &c.), but if the heir conveyed away the estate before action brought, the specialty creditor was without remedy, and this was the case if the ancestor by his will devised the estate to any person, for the creditor had no remedy against such person, who is technically called the devisee. The legislature perceived that such a doctrine was not exactly in accordance with justice, and interfered. The first Act of Parliament passed to remedy this grievance was the 3 & 4 Will. and Mary, c. 14, made perpetual by the 6 & 7 Will. III., c. 14, which gave to a specialty creditor a remedy against the heir and devisee *jointly*, and if the heir aliened before action brought, he was liable to the amount of the value of the land, unless the land were *bonâ fide* aliened, *i. e.*, conveyed for a valuable consideration. It is to be observed, that no remedy was given by these acts to the creditor against the devisee *alone*, if there were no heir; and it was decided that the acts only applied to specialties on which an action of *debt* would lie, such as bond debts or covenants for the payment of sums certain, but not for damages, for breaches of covenants, or contracts under seal. But, at length, the 1 Will. IV., c. 47, was passed, repealing the above acts, and curing these defects by facilitating the payment of debts out of real estate. It operates upon the wills of all persons in being at the passing of it [16th July, 1830], and upon all wills thereafter to be made by all persons whomsoever. The second section makes devises of real estate void, as against the specialty creditors, by bond, covenant, or otherwise. The third section gives them a remedy, by actions of debt or covenant, against the heir and devisee, or the devisee of such first named devisee, and if there be no heir, then against the devisee (§ 4). Section 6 makes the heir liable to the amount of the value of the lands, if he alien before action brought; but lands *bonâ fide* aliened before action brought, are not liable to such debts in the purchaser's hands. Section 8 gives similar remedies against a devisee, if he alien before action brought. Before this act became the law of the country, if a trader died before he was declared a bankrupt, leaving a real estate, this was not hable to his simple-contract debts (*i. e.*, those not under seal, as a bill of exchange, &c.); but by the ninth section of this act, which repealed the 47 Geo. III., sess. 2, c. 74, it was enacted, "that when any person, being at the time of his death a trader within the bankrupt laws, shall die seised of or entitled to any real estate which he shall not by his last will have charged with the payment of his debts, and which would have been assets for the payment of his debts due on any specialty in which the

(6.) It escheats to the lord of the manor for want of heirs, except in the case of persons having the legal estate, as trustees or mortgagees, in pursuance of 13 & 14 Vict., c. 60, § 46, which act also prevents forfeiture of such estates by reason of the attainder or conviction for any offence of a trustee or mortgagee.

(7.) It is forfeitable for treason of the beneficial owner to the crown absolutely; for murder, to the crown during a year and a day, and then to the lord of the manor absolutely; for other felonies to the crown, during a year and a day, and then the lord takes the profits during the felon-owner's life, who still retains the legal estate, which upon his death devolves upon his heir at law.

heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, *as well debts due on simple contract as on specialty*; provided that all creditors by specialty shall be paid the full amount of their debts before any creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands." Thus real estate belonging to traders was liable to all sorts of debts. By § 11, where any suit had been or should be instituted for payment of debts of a deceased person, to which the heir or devisee might be liable, and the Court of Chancery should decree the estate to be sold for payment of such debts, and by reason of the infancy of such heir or devisee, an immediate conveyance could not be compelled; the Court might order such infant to convey to the purchaser, and the conveyance would be as valid as if the infant were of full age: by § 12, persons having a life estate, or other limited interest, can convey the fee-simple by order of Chancery. This act only extended to conveyances where a decree had been made for sale, and did not empower the Court to direct *mortgages* to be made; this authority was afterwards given by 2 & 3 Vict., c. 60, which declared that the surplus of the money arising from such sales or mortgages should descend in the same manner as the estates sold or mortgaged would have done. The 11 & 12 Vict., c. 87, extended the 1 Wm. IV., c. 47, §§ 11 & 12, to the real estate of a deceased person which shall, by descent, or otherwise than by devise, be vested in the heir or co-heirs of such persons, subject to an executory devise over in favour of a person not existing, or not ascertained. At length the 3 & 4 Wm. IV., c. 104, rendered the real estates of every person liable to all kinds of debts by enacting, that, after the 29th of August, 1833, when any person shall die seised of or entitled to *any estate or interest* in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether *freehold, customaryhold, or copyhold*, which he shall not by his last will have charged with or devised, subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, *as well debts due on simple contract as on specialty*; and that the heir at law, customary heir, or devisee of such debtor shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir at law or devisee of any person who died seised of freehold estates, was, before the passing of the act, liable to in

§ 2 (b). *Fee-tail.*

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| <ol style="list-style-type: none"> 1. Its description. 2. The particular mode in which the heirs succeed. 3. Statute <i>De Donis</i>. 4. The 3 & 4 W. 4, c. 74. 5. Distribution of entails. | <ol style="list-style-type: none"> 6. The technical words which create this estate. 7. Effect of conveying a fee-simple by a tenant-in-tail. 8. Incidents of a fee-tail. 9. The rule in Shelley's case. |
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Fee-tail :
1. Its descrip-
tion.

1. This estate is distinguishable from a fee-simple absolute, inasmuch as it is confined to certain specified heirs of the owner, while a fee-simple is (as we have seen) altogether unconfined and unlimited. Preston¹⁶ describes an estate-tail to be "an estate of inheritance, to a man or woman, and his or her heirs of his or her body, or heirs of his body of a particular description, or to several persons and the heirs of their bodies, or the heirs generally or specially of the body or bodies of one person or several bodies. For an estate-tail must be *confined* to the descendants of some individual, living or dead, or of two persons, being, husband and wife, or who may lawfully intermarry." Where an estate is limited to two persons who are of the same sex, or between whom a marriage cannot lawfully take place, and the heirs of their bodies, they will have a joint estate for their lives, the entirety going to the survivor for his life, with several inheritances in tail general as tenants in common in remainder.

The quantity of this estate is marked by the particular limitation ; for when there is a failure of those heirs which the transfer describes, the estate will be at an end. Now

respect of such freehold estates, at the suit of creditors by specialty, in which the heirs were bound. And it is provided, that, in the administration of assets by courts of equity under the act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands. The personal estate is the first and natural fund for the payment of debts; and though a testator charge real estate, by his will, with the payment of his debts, yet this will not exempt his personal estate from being first applied for that purpose, *unless* the testator expressly exonerate it.

(16) 2 Est., c. ix., p. 355.

a failure of heirs universally happens as soon as there is a defect in the line of those heirs in whose favour the entail is created. It is a characteristic of this estate to entitle none to enjoy it but the issue or lineal descendants of the first owner, or those who stand in the same degree of relation with him; and these only when they can severally claim in successive order under a general name of purchase, as heirs of the body of their father, which they can all answer. Not only land, but rents, commons, estovers, offices, and dignities may be entailed, since the word "tenement" used in the statute *de donis* comprehends all these interests.

2. Under an entail, the heirs do not take strictly in that character, but as issue of an ascertained denomination; for they may take as particular heirs of the body of their ancestor, though they are not his heirs generally, and they may succeed to an entail, though they cannot answer the description of heirs for want of inheritable blood.

2. The particular mode in which the heirs succeed.

The same person may have several estates-tail, one in remainder after another; *ex. gra.*, to A. and his heirs male of his body; remainder to the same A. and his heirs female of his body; or heirs of his body generally; or thus:—to A. and his heirs of his body by his present wife, remainder to the same A. and his heirs of his body by any other wife. It must be guarded against, in settling property in this way, that a former limitation does not necessarily include all the issue of a subsequent remainder; for if an estate be limited to A. and his heirs of his body generally, remainder to him and his heirs male of his body, the remainder will be void, because no heir can take under this second limitation without having had a previous title to the same, or a greater extent of interest under the previous limitation. It is obvious that the remainder is but a narrowed limitation of the original general limitation, and, therefore, of none avail.

This estate must be made to the donee and the heirs of

his own body, in order that he himself, as the donee by name, may take the estate-tail; for under a limitation to him and the heirs of the bodies of his own parents, he will not take an entail. Such a limitation passes two distinct estates, for the donee will take an estate for his own life, while the estate-tail will vest in the person who can bring himself within the description of "heirs of the bodies of his own parents." Perhaps the donee may be the person answering to this description, when he will, of course, take the estate-tail, but it will not vest in him simply because he is named, but because he answers to the description of the gift. That this is clear may be shewn from supposing that another person was the heir of the body of his ancestor; such person would then undoubtedly take the estate-tail, so that his enjoyment of such entail would be merely accidental, while his life-freehold would be the positive and express purpose of the transaction.

3. Statute *De Donis*,

3. The statute *de donis conditionalibus*, otherwise called Westminster the 2nd (13 Edw. I., c. I.), established and preserved this estate by converting the ancient common law conditional fee into the modern entail:¹⁷ it requires the intention of the person who creates the estate and is denominated the donor, (the donee being he who enjoys it), to be observed according to the words in which he has expressed that intent. This intent is to be collected from the words of the instrument in the clause of limitation. Thus the rights of the donor and the posterity of the donee were protected and secured. The donor acquired an actual estate in reversion, where he had before a mere possibility of reverter, and this was effected by the conversion of the conditional fee-simple into a particular estate, which we

(17) Tenant in fee-tail is by the force of the statute of Westm. 2, c. 1, for before the said statute all inheritances were fee-simple; for all the gifts which be specified in that statute were fee-simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute tenant in taile is in two manners, that is to say, tenant in taile generall and tenant in taile speciall.—*Litt.* § 13.

now call a fee-tail.¹⁸ The aim of the statute was to preserve the estate for the specified issue, from generation to generation, after the donee's death, and after the extinction of such issue, then for the donor or his heirs; it was considered as a family law to preserve the property and maintain the pomp of the old nobles; it aimed at perpetuity, rendered realty inalienable, reduced the influence of the crown, cramped commercial energy, and withered the industry and competitive exertions of the people.¹⁹

4. Estates tail were thus made inalienable, and neither the issue nor the remainder-man could be barred. And experience proved other inconvenient consequences, which, quickening the ingenuity of the judicature, produced, at length (in its efforts to recover the liberty of alienation), the complicated machinery of fines and recoveries, which in their turn were abolished by the legislature passing the 3 & 4 W. IV., c. 74, which recognised and provided for the convertibility of estates tail either into base fees, or fees simple, according to particular circumstances.

Thus the issue in tail are put completely in the power of their parent, who possesses the peculiar privilege of extending his estate tail into a fee-simple, and thus gets rid of all trammels and conditions, defeats the expectancy of both his own issue and all the remainder-men and reversioners, and makes himself absolute and uncontrollable owner.²⁰

5. It is usual to divide estates tail into (1.) General, and (2.) Special. General is where only one person's body is specified, from which the issue must be derived, as "to A. and the heirs of his body." Special is where both the pa-

(18) From *taillare*, or *tailler*, to cut or reduce into new dimensions and form.

(19) See Erskine's Oration at Cambridge; and 1 Inst. § 19 b.

(20) The practical mode of effecting this involves such numberless points and details, that a Tractate will be wholly devoted to the barring of entails.

4. The 3 & 4 Wm. IV., c. 74.

5. Distribution of entails.

rents are named, as "to A. and the heirs of his body to be begotten upon B.," or, to B. and the heirs of her body to be begotten by A.," or, "to A. and B. and the heirs of their bodies,"²¹ A. and B. being then joint-tenants of the inheritance.

Estates tail, whether general or special, may be made descendible to all the issue in their order, without distinction of sex, as in the examples just given, or they may be confined to the heirs male or female, distinguished by the terms tail-male and tail-female, in which cases the descent must be traced entirely through males or females, according to the strict intent of the parties.

The following is a more elaborate, and more logical division of this estate.²²

Estates tail, are distributable:—

(1st.) As to their descent; into

1. General.
2. Qualified.

(2nd.) As to the sex of the issue who may succeed; into

1. General, as extending to both sexes.
2. Special, as admitting one sex to the exclusion of the other.

(3rd.) As to the parentage of the issue; into

1. General.
2. Special.

So that the same estate may be, at the same time, general in one respect and special or qualified in another; *ex. gra.*, "to A. and the heirs male of his body."

With regard to the first division, which is as to the descent of an estate-tail; a gift²³ "to A. and the heirs

(21) Burton's Comp. 207 (7th edit.)

(22) 2 Prest. Est. p. 383.

(23) By whatever assurance an entail is created, the limitation which conveys the estate is called a gift.

of his body" is an instance of an estate-tail *general* under the first subdivision. So, also, a gift "to A. and the heirs of his body, either male or female, or by a particular woman;" although, in another respect, it is a special entail.

A gift "to A. and his heirs of his body, and to one heir of the said heir only," is an example of a *qualified* descent, as it does not extend to all A.'s lineal descendants.

As to the sex of the issue, who may succeed, which is the second division, a gift "to A. and his heirs of his body," affords an example of the first subdivision, for this limitation admits both sexes to the succession, and gives continuance to the estate as long as there shall be issue of either description.

A gift "to A. and his heirs male of his body," or "to A. and his heirs female of his body," are examples of the second subdivision, for only one sex is admitted to the exclusion of the other. Entails of this sort are not within the express words of the statute *de donis*, but they are allowed on an equitable construction of the statute.

Preston has this passage²⁴ on special entails:—The person who claims to entitle himself as an heir male under a gift to the heirs male of the body, must, through every degree, convey his descent by *males*, without the intervention of females; and in like manner the person who claims to entitle herself as an heir female, under a gift to heirs *females* of the body, must, through every degree, convey her descent by *females*, without the intervention of males; so that no male, issuing of the body of a female, or female, issuing of the body of a male, can, under a gift in this special form, deduce a title from any ancestor in an higher degree, as to a female, than her father, in a case of a gift to a man and the heirs *female* of his body; and as to a male, than his mother, in the case of a gift to a woman and

(24) 2 Estates, p. 403.

the heirs *males* of her body, otherwise than through ancestors of that sex which the limitation describes.

So that when a gift is made to a man and his heirs female of his body, and he hath issue a son, who hath issue a daughter, this daughter cannot inherit under this gift, because she cannot convey her *descent* through *females*.

But a male issuing from the body of a female may entitle *himself* as the heir male of the body of his mother under a gift to the mother and the heirs *male* of her body ; and in like manner a female may entitle herself, as heir female of the body of her father, under a gift to her father and the heirs female of his body ; because in these cases the father and mother take as purchasers, and they are the stocks or ancestors from which the particular and special line of heirs is to be derived.

As instances of the third division ; an estate made “ to A. and the heirs of his body ” conveys an estate in general tail ; for such a limitation does not restrict the issue of the donee to proceed from any particular person, for the issue of a husband by any wife or the issue of a wife by any husband may succeed. But an entail special, in this particular, ascertains the person by whom, or on whose body, the heirs inheritable to the entail shall be begotten. As instances then of the second and last subdivision, take the following :—

An estate limited “ to A. and his heirs of his body begotten,

1st. On the body of Emma his now wife.

2dly. On the body of a deceased wife, provided there are issue from her at the time of the limitation, otherwise only a life-freehold passes.

3dly. On the body of a person of a *particular name* ; as *Mary Searle* ; without specifying the person.

4thly. On the body of a person who is not his wife, and

although she be the wife of another man, and whether the donee be a single or a married man; or on the body of a person of particular rank; as a person of the degree of peerage; or on the body of a person being a protestant,²⁵ &c., &c., or a person who shall have a given portion, as 10,000*l*.

5thly. On the body of his first wife, or on the bodies of two women by name."

And also a gift to a man and woman who are married, or may lawfully intermarry, and their heirs of their bodies, conveys an estate in special tail.²⁵

6. The words which create an estate tail, we will now proceed to notice.

6. The technical terms which create this estate.

Let us first take deeds.

The term "heirs" should be used, although the word "heir" in the singular number will create an estate-tail.²⁶ But this word must be used either in the singular or plural number, which last is invariably adopted. In addition to this term, the deed must contain, either in direct terms or by reference, *words of procreation*, to describe the body from whom the heirs are to proceed, or the person by whom they are to be begotten.

As to wills, Preston²⁷ says:—

In a will technical words of limitation are not necessary: thus a devise

1. To A. and his issue.
2. To A. and his seed.
3. To A. and his heirs male.
4. To A. and his heirs lawfully begotten.
5. To A., and if he die before issue, or not having issue, or not having a son, then to another,

(25) Of this description is the entail of the Crown of England, viz.: to the Princess Sophia of Hanover, and the heirs of her body being Protestants.

(26) *White v. Collins*, Com. Rep. 289 and 301; 2 Prest. Est. 475.

(27) 2 Est. p. 482, *et seq.*

will give estates-tail. So numerous are the cases on this voluminous subject that we cannot possibly explain them fully in this place.²⁸ In wills, however, great indulgence is exercised, and if the courts can collect from the language used by a testator, that it was his intention to entail his devise, they will rule accordingly. The plain sense of words is followed by the courts in their expositions of obscurely-expressed wills; wresting and torturing language out of its natural signification, will not be permitted; for thus to defeat a testator's intention is directly counteracting the injunctions of the law, and "racking a man upon his death bed," remarked Lord C. J. *Wilmot*, "to make him say what he never meant or thought of."

By the Wills' Act, 1 Vict., c. 26, § 29, it is provided, that "in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required, for obtaining a vested estate by a preceding gift to such issue."

Mr. Hayes observes (2 Conv. p. 7):—"It is quite unneces-

(28) The reader is referred to 2 Preston on Estates, c. xi.; Burton's Comp. c. 2; and the cases there quoted.

sary to add "lawfully begotten," or "lawfully issuing," or any other expressions of the like import, in order to create an estate tail even in a deed. It is enough if the word *heirs* be used, and the person from whom the issue is to proceed be ascertained. In framing limitations to *children* as purchasers, it is abundantly sufficient to say, "the children of A.," or "the children of A. by B.," or "the children of the intended marriage." The vulgar form, "the children of the body of A., on the body of B., his (A.'s) intended wife, lawfully to be begotten," seems to be the product of a confused notion of the legal rules relative to the creation of an estate tail.

7. If the tenant in tail grant the fee simple to another person and his heirs, only a qualified or base fee will pass, commensurate with the estate tail, and capable of being rendered absolute,²⁹ but until then defeasible by the entry not only of the reversioner, or remainder-man, when he becomes entitled to enter into possession of the estate, but also of the issue in tail upon the death of the tenant in tail. It should be observed that an estate-tail cannot be conveyed to another.

7. Effect of conveying a fee-simple by a tenant-in-tail.

8. This estate possesses the following incidents :—

8. Incidents of a fee-tail.

- (1.) It is subject to curtesy and dower, like a fee-simple.
- (2.) The owner may commit waste upon it without being impeachable for it.
- (3.) It is liable to every kind of debt.
- (4.) It is subject to escheat and forfeiture.
- (5.) The owner may grant leases out of it under the restrictions provided for by the statutes of 32 Hen. VIII., c. 28, and 3 & 4 W. IV., c. 74, which will bind the issue in tail, but not the remainder-man or reversioner, but

(29) See 3 & 4 Wm. IV., c. 74, § 38.

if the requisites of the statute be not observed, they may be avoided by the issue in tail, after the death of the tenant in tail.

(6.) It may be barred by virtue of the 3 & 4 W. IV., c. 74.

9. The rule in Shelley's case.

9. There exists a rule of law of very early antiquity, which is known as the rule in Shelley's case,³⁰ not because it was then first propounded, but because it determined the case. As this rule bears materially upon the subject of inheritable fees, we will, in this place, endeavour to exhibit, succinctly, the principles involved in it.

The rule then is this :

When a person takes an estate of *freehold*, legally or equitably, under a deed, will, or other writing, and afterwards, in the same deed, will, or other writing, there is a limitation *by way of remainder*, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or his heirs of his body ; by that name in deeds or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons to take in succession, from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation. The word heirs then is a word of limitation of the estate, and not of purchase, and, therefore, the ancestor takes the whole estate ; if it be limited to the heirs of his body, he takes a fee-tail ; if to his heirs, a fee-simple-absolute.³¹

(30) 1 Co. R. 93, b.

(31) The rule is, by some writers, deemed to be of feudal origin, or to be accounted for only on the principles of that system of tenures, and the consequential fruits of seigniority.

This was the opinion of Justices *Aston*, *Willes*, and *Yates*, delivered in *Perrin and Blake* (Harg. Coll. Jurid. 298) : the first of whom said, "The maxim itself grew with feudal policy ;" the second, that "It was an old rule of feudal policy ;" and the third,

The general law, without this particular rule, is thus embodied in Butler's note (l) to Fearn's Contingent Remainders (p. 27).

“Where land is limited to a person for his life, and after his decease to his heirs, or to the heirs of his body, the second limitation might be thought to have an appearance of giving the heir an estate by purchase, or an original estate, primarily vested in himself, and not claimed by him derivatively through his ancestor. For, as the land is expressly limited to the ancestor for his life, it might seem contrary both to the expression of the deed and the intention of the grantor, that the ancestor should take a larger estate; and as no person can have an heir during his life, the heir being the individual on whom the law casts the succession at the instant of the testator's decease, it might be thought that, where an estate is limited to a person expressly for his life, and after his decease, to his heirs, the

that “The rule had its origin in feodal policy, and grew up in days when the law favoured descents as much as possible.”

After *wardships*, *reliefs*, and other incidents of tenure flowing from estates of inheritance were introduced into this system, it was accounted a fraud on the lord, who was entitled to these fruits and incidents on the death of his tenant, and the succession of the heir, that there should be a power to give the property to the ancestor, for his life only, and of extending the enjoyment to his *heirs*, *quatenus* they were his heirs: so that the heirs should be entitled *precisely in the SAME MANNER* as if they took *by hereditary succession*, and yet take *as PURCHASERS* in their own right, and, as a consequence, defeat the lord of the fruits to which he would have been entitled on a succession from the ancestor.

On this account, and with great reason, this rule is supposed to have been framed, in order to give the inheritance to the ancestor, so that the *heirs might take by hereditary succession* in a *COURSE OF DESCENT*; and so that the lord might have the fruits of his seignior.

Other writers (*Gilbert, Fearn, &c.*) have been of opinion, that the rule owes its existence to the relation between the *heir* and the *ancestor*, and the genuine construction of the law. They contend, that the law esteems a limitation to a man and his *heirs*, or *heirs of his body*, by *several* and *distinct* clauses, and even with a division of the *time or interest*, to pass by these clauses, to be of the same nature, import and extent, as a limitation to a man and his heirs, or heirs of his body, by one connected clause of gift: with the difference only, that when the limitations are several and distinct, and estates are substituted *INTERMEDIATELY*, the intermediate estates must have priority, according to the order of their limitation.

limitation to the heirs must necessarily be contingent during the ancestor's life.

“ In either supposition, there would be ground to contend that the heirs should take an estate of inheritance by purchase.

“ But by a rule of law of early antiquity (*i. e.*, the rule in Shelley's case), it is settled that, in all these cases, the remainder to the heirs is immediately executed in the ancestor, and therefore is not contingent or in abeyance.”

Let us show, once for all, the difference between “ words of limitation” and “ words of purchase ;” phrases which are used in contradistinction to one another.

By the former expression it must be understood, that the *interest* limited by these words is not originally given to the *heirs*, but to their *ancestor*, either mediately, immediately, or eventually ; so as to create in him an estate or interest of inheritance descendible to his heirs, of the given description ; and subject to the ownership under the gifts, if any, interposed between the several limitations, when there is one to the ancestor, and another to his heirs, or heirs of his body.

By the latter expression is meant such words as give the estate limited by the term “ to the heirs,” originally in their *OWN RIGHT*, and as persons answering that description, and not through the medium of, or by descent from any ancestor ; so that these heirs are the purchasers under the appellation of heirs, and are to take without any reference to a previous right in their ancestor, in whom the estate, to pass by the limitation to the heirs, cannot vest in any possible event.

In general, words of purchase are those by which, taken absolutely, without reference to or connexion with any other words, the estate first attaches, or is considered as commencing in point of title, in the person described by them ; whilst words of limitation operate by reference to

or in connection *with other words*, and extend or modify the estate given by such other words.

To return to the rule, Preston³² analyses its requirements as follows :

1st. That the *ancestor* **MUST** take a *preceding* estate OF FREEHOLD either *by limitation, by resulting use, or implication of law*, and it will not be at all material, although the estate be made without impeachment of waste, or with powers of leasing or jointuring, or with a limitation to trustees to preserve contingent remainders.

2dly. There shall be a limitation to the *heirs*, or heirs of the body, of the person taking that estate ; by that, or some such substituted name, and not the heirs, as meaning or explained to be, sons, children, &c.

3dly. These heirs shall be named to take as a *class* or *denomination* of persons.

4thly. In succession, from generation to generation.

5thly. By way of remainder ; or, at least, so that the estate to arise from the limitation to the *heirs*, and the estate of freehold in the *ancestor*, shall *both* owe their effect to the SAME DEED, will, or writing, or that which is tantamount thereto ; so that the several instruments, if there be several, may be parts of the same transaction ; as, a deed or will creating a power, and an appointment exercising the power, or a will, and a codicil being part of the will.

And *lastly*, The several limitations should give interests of the SAME QUALITY : both *legal*, or both *equitable*.

Leaving it indifferent,

1st. Whether the limitation to the *heirs* is to give an

(32) 1 Prest. Est. p. 266.

interest, to take place immediately after the determination of the ancestor's estate of freehold, and consequently connect itself with that estate, and, by *merger* thereof, form one entire interest ; or to take place at a remote period ; waiting *for* and continuing expectant *on*, the *determination* of some *other* estate, limited in remainder of the ancestor's estate.

2dly. Whether the limitation to the *heirs* is to give a *vested* or *contingent* interest.

To a limitation to the heirs, to take effect *by* SPRINGING USE, the rule has no application.

Neither does it apply where there are words of limitation engrafted on the remainder to the heirs, inconsistent with the nature of the descent pointed out, as "to A, for life, remainder to his heirs and their heirs female of their bodies;" or there be explanatory words added thereto, as "to B. and the heirs of his body (that is to say) to his first, second, and other sons," or "to A. and the heirs male of her body begotten or to be begotten, as tenants in common, and not as joint-tenants, and if such issue should die before he, she, or they should attain twenty-one, then to B. in fee," or "to A., and after her decease, to the heirs of her body, share and share alike, if more than one:" since in all these cases the heirs take as purchasers.³³ If the word "heir" be used in the singular number, without any words of limitation thereon, the rule applies, unless it be limited to the heir for life, or words of limitation are added, then the word "heir" is deemed a word of purchase, and the rule does not operate.³⁴ While the rule applies to trusts executed, it does not to trusts executory, the issue being deemed by the Court of Chan-

(33) 1 Rep. 95 b; *Doe v. Goff*, 11 East. 668.

(34) *White v. Collins*, Com. Rep. 289; 1 Myl. & Cr. 411.

cery as purchasers, especially in the case of marriage articles.

To conclude this subject,³⁵ Mr. Hayes (1 Conv. 545) gives this mode of applying the rule:—

When the ordinary rules of construction have ascertained the co-existence of a freehold in the ancestor, with a remainder to the heirs, the simplest and surest method of applying the rule is to read the second limitation as a limitation to *the ancestor himself and his heirs*. This gives at once, and in every possible case, the true result. The effect, universally and constantly, will be the same as if the remainder had been expressly and intentionally limited to the ancestor and his heirs:—reading the words “and his heirs,” not as words of limitation of the estate of freehold before expressly *limited* to him, but as words of limitation of the estate in remainder *attributed to him by the rule*.

§ 3. (c) *Fee—Qualified or Base.*

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|----------------------------------|--|
| 1. Its description. | 4. Its alienation. |
| 2. The rules against perpetuity. | 5. LIFE-FREEHOLDS—their requisites. |
| 3. How this estate is created. | The five species of this second order. |

1. This species of inheritable freehold is marked, as to its duration or time of continuance, by an event beyond which it is not to endure. The event is the qualification which gives a name to this estate, and ascertains its determination. A fee-qualified is frequently called a fee-base, *i.e.*, impure, defective, and circumscribed.³⁶ There is hardly any event, provided it be lawful, and do not violate

Fee-qualified,
or base:—
its descrip-
tion.

(35) For elaborate strictures on this rule, Fearn's Contingent Remainders, by Butler, c. I., § 5, pp. 28—208, and Preston on Estates, Vol. I., c. III., pp. 263—419, should be consulted.

(36) Indeed every estate, not simple and absolute in regard to continuance of time, is base, in reference to one possessing these attributes. It is in this sense, and with a view to this distinction, that the epithet “base” is applied to estates.—1 Prest Est. 439.

the rule against perpetuity, which may not be made the cause of the determination of this fee.

The rules
against
perpetuity.

2. Before we proceed to observe any further upon this estate, let us state the rules against perpetuity.

It being the policy of English Law to prevent property being tied up in families, and so taking from the owner for the time being all power of selling or otherwise disposing of it, two rules have been laid down to prevent this evil.

The Common Law rule applies to the realty itself, and is thus settled :—1. That the *corpus* of property may be withdrawn from alienation for a life, or any number of lives in being, AND twenty-one years, computed from the dropping of the life or of the surviving life.—2. That the effect may flow, either indirectly, from the circumstances of the takers; or directly from an arbitrary suspension of the vesting for a period measured by the life or lives of any person or number of persons in being, not otherwise connected with the gift, and for a further period of twenty-one years from the death of such person, or the survivor of such persons, not referable to minority.—3. That a child *en ventre sa mère* is, according to the general principle of law, and within the meaning of the particular rules, a life in being; so that such a child or any number of such children, may be selected, either as objects of the settlement or as the measure of its continuance; the period of gestation being considered part of the life.—4. That if the vesting were suspended for the whole period allowed by the rule, and the object of the ultimate gift should, independently of intention, be, at the time of vesting, a child *en ventre*, such gift would be clearly good, and even if the gift were designedly so framed as to superadd personal disability to the suspense allowed by the rule, it should seem that the gift, though carried to the extreme verge of the law, would yet be valid.—5. That the “few months” (assuming the

difficulty of fixing the limit to be overcome) are not, like the twenty-one years, admissible, as a term in gross, but only as the result of actual gestation, and as a consequence of the *general* principle of law, which, in construing gifts, treats a child *en ventre* as *in esse*, whence it should seem that this indeterminate allowance is not accurately introduced into the statement of the *particular* rule, but whether occurring at the commencement or the termination, or, as it may do, at both ends of the period, ought to be tacitly included.

The second rule is provided for by Act of Parliament, and prevents the protracted accumulation of income.

The 39 & 40 Geo. III., c. 98, (commonly called Thelusson's Act,) prohibits the settlement or disposition of any "real or personal property so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors; OR the term of twenty-one years from the death of any such grantor, settlor, deviser, or testator, or during the minority or respective minorities of any person or persons who shall be living, or *en ventre sa mère*, at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurance directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated. And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such

person or persons as would have been entitled thereto, if such accumulation had not been directed." But by § 2, the act does not extend "to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements."

How this
estate is
created.

3. The following events are specimens of qualifications, which may be *expressly* annexed to this estate :—

A limitation to A and his heirs ;

- (1.) Peers of the realm ;
- (2.) Lords of the manor of Blackacre ;
- (3.) Tenants of the manor of Dale ;
- (4.) During the time, whilst a particular tree shall stand ;
- (5.) Till the marriage of a certain person take place ;
- (6.) Till certain debts be paid ;
- (7.) Till default be made in payment of a given debt at a certain time ;³⁷
- (8.) Until a minor shall attain his majority.

When these events terminate, or the acts are done or omitted to be done, according to the meaning of the given restriction, the fee-qualified will cease ; but it *may* possibly, as is obvious, continue for ever, in those instances especially where the qualification is not certain to take place. The estate will then continue to all eternity, precisely in the same manner, as if no collateral event, giving to the estate a determinate character, had been annexed to it.

(37) This is the case of a mortgage, which will be treated of in a separate Tractate.

A base-fee may arise, in the absence of any express qualification, when it is made determinable, by construction of law, on a certain event. An instance has already been given (*ante*, p. 29) where a tenant-in-tail with remainder to a stranger, conveyed the fee-simple to another in the property entailed upon him, such other would take a qualified fee by legal construction, determinable on the death of the tenant-in-tail, and failure of the issue under the entail. Another example of such an estate is, when a tenant-in-tail, not being himself entitled to the immediate remainder or reversion in fee, conveys without the consent of the protector of the settlement, he then transfers a base fee determinable on the failure of his issue in tail.³⁸

4. A qualified fee is confined in its extent, and confers a Its alienation. limited power of alienation, entitling the owner to give an interest of the same extent and continuance only to another person, which he has in himself. So that the estate will, notwithstanding the transfer, be determinable, and into whose hands soever it may come, will cease on the happening of the event, upon which such qualified fee depends.

5. The order or class of LIFE FREEHOLDS next de- Life-freeholds —their requisites. mands our attention.

A freehold for life, or mere freehold (being the lower class of freeholds, as distinguished from fees or inheritable freeholds), is that which endures for the life only of the possessor, or of some other person, and does not amount to an inheritance.³⁹ It is defined to be "An estate in possession, remainder, or reversion, in corporeal or incor-

(38) 3 & 4 Wm. IV., c. 74, § 34.

(39) Littleton's words (§ 57) are very precise and unambiguous. "And every one which hath an estate in any lands or tenements for term of his own or another man's life, is

poreal hereditaments, held for life or for some uncertain interest created by will, or by some mode of conveyance capable of transferring an estate of freehold, which may last the life of the devisee, or grantee, or of some other person." Uncertainty of duration is not the essential property which constitutes an estate freehold.

For if a man grant an estate to a woman, *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay a certain sum of money, or until the grantee be promoted to a benefice, or for any like uncertain time, which time, as Bracton saith, is *tempus indeterminatum*; in all these cases, if it be of lands or tenements, the lessee has in judgment of law an estate for life, determinable if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he has a like estate for life by the delivery of the deed; and in count or pleading he shall allege the lease, and conclude that by force thereof he was seised generally for term of his life.

Here the construction of the terms of the grant to mean a life estate, and the circumstance of livery of seisin, are the characteristic features; and it does not appear that much is gained by defining a freehold to be an estate for an uncertain period, included in some person's life; since the facts that made an estate freehold, were the livery of seisin (or, in modern times, that which is tantamount to livery) and the grant for life *at the least*. And all that can be added to that is, that certain other interests in lands

called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee-simple hath a freehold, and tenant in tail hath a freehold, &c." Upon which Lord Coke has the following commentary. "Here it appeareth that tenant in fee, tenant in tail, and tenant for life, are said to have a frank-tenement, a freehold, so called, because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage, or customary, or copyhold lands."—Co. Litt. 43 b.

and tenements, which, from the terms in which they were granted, possibly might, and probably would, be co-extensive with the life of the grantee, have been held to be estates for life; thus constituting a distinction among estates for life, which are thus divisible into estates for life absolute, and estates for life determinable.⁴⁰

Upon the whole view of the cases, *livery of seisin*, or what under the Statute of Uses is equivalent to livery, appears to be the investitive fact—the primary, fundamental element of a freehold. Although, in the majority of the cases, the estate is not determinable at the mere will of the lessor; the fact of its being determinable at the will of the lessor only, has been held not to deprive it of the character of a freehold, provided there was livery of seisin, or its equivalent, or, in the case of things lying in grant, delivery of the deed.⁴¹ So that, upon the whole, as regards the definition of a freehold in the present state of the law on the subject, it does not seem safe to go beyond Mr. Justice Blackstone's description of a freehold, viz. "that it is such an estate in lands as is conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto."⁴²

This order of estates, which is by far the most numerous order in this country, seeing how many estates are under strict settlements, and consequently in the possession of tenants for life, is distributable into these five species:—

(a) For the life of the tenant.

(b) For the life or lives of others.⁴³

(40) "A man may have an estate for term of life determinable at will; as if the king doth grant an office to one at will; and grant a rent to him for the exercise of his office for term of his life, this is determinable upon the determination of his office."—Co. Litt. 42 a.

(41) See 8 & 9 Vict., c. 106, § 2.

(42) 2 Bla. Com. 104.

(43) Coke (Co. Litt. 14 b) adds another estate, which is one both for term of the tenant's life and for term of another person's life: *ex. gra.*, a lease to A., to hold to him for term of his own life and the lives of B. and C.; here the lessee has but one freehold,

- (c) Tenancy-in-tail after possibility of issue extinct.
- (d) By the curtesy of England.
- (e) In dower.

The two first are *conventional*, arising by the mere acts and agreement of the contracting parties; the third arises by the act of the Deity, and the two last are *legal*, arising by the simple operation of the law. It is to be further observed that the three last estates are confined to the lives of the parties, to whom the law originally assigns them. We will detail these estates as they stand in this list.

§ 4 (a) *For the life of the tenant.*

1. Its description, and how created.—2. Its incidents.

Its description,
and how
created.

1. An estate for the life of the tenant needs no explanation; it is sufficiently definitive in itself. It may be created not only by express words in a deed or will, but also by a general grant, without defining any specific interest; as to A., without other words, thus making A. tenant for life, as it is an intendment of law that the grantor meant the tenant to enjoy the estate during the whole of his life. When we speak of an estate for life, we understand by the phrase, an estate for the owner's own life, and not for the life of another. If an estate be granted for a term of life generally, without setting forth whose life, it is construed to be an estate during the life of the grantee, and not for the life of the grantor or of any other person, for these reasons, because an estate during one's own life is deemed by law more beneficial and of a higher nature than for the life of any other person, and because it is a great rule in the construction of deeds to take them most strongly against the grantor, the Crown always ex-

limited during his own life and the lives of two others. This estate will continue during these three lives and the survivors or survivor of them.—Cro. Eliz. 102.

cepted. But if a tenant in tail make such a lease, it shall be taken for the life of the lessor; for where there is a double intendment, the one standing with law and right, and the other wrongful and against law, the former intendment shall be taken. In properly drawn deeds the intent to grant an estate for life is thus expressed, “to have and to hold the same, &c., to him the said A. and his assigns, for and during the term of his natural life.” So an estate granted to a person as long as he shall dwell in such a place, or enjoy such an office, is a freehold confined to an uncertain period included in such person’s life. In a will, if there be no express limitation of the estate, then the question will be, how great an estate can the testator devise? and the answer to this question will be the extent of the disposition, as we have already seen.

A condition at common law may be annexed to an estate for life, as well as to a fee-simple: but it seems that this cannot be a condition prohibiting all alienation on pain of forfeiture; though the estate may be made unalienable in its original limitation, if given not for life, but *until* alienation is attempted.⁴⁴

2. The following are the incidents annexed to this estate:— *Its incidents.*

(1) A tenant for life may convey or demise his interest by the same means as a tenant-in-tail. The distinction between innocent and tortious conveyances are now abolished; and if the tenant adopt any kind of conveyance whereby he conveys a greater estate than he possesses, such conveyance will only be void for the excess, and will work no forfeiture, but will only convey what the tenant can lawfully part with, viz., an interest determinable on such tenant’s death; the fourth section of 8 & 9 Vict., c. 106, enacting, “that a feoffment (which was the only tortious

(44) Burton, pl. 737.

conveyance then remaining) made after the 1st October, 1845, should not have any tortious operation."

But a tenant for life is empowered, in certain cases, to convey the fee-simple. By the stat. 1 Will. IV., c. 47, s. 12, it is provided that where any lands are devised in settlement by any person, and by such devise are vested in any person for life or other limited interest, with any remainder, limitation, or gift, which may not be vested, or may be vested in some person from whom a conveyance cannot be obtained, or by way of executory devise; and a decree shall be made for the sale thereof, for the payment of the testator's debts, it shall be lawful for the Court of Chancery to direct such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey the fee simple, or other the whole estate, in such manner as the court shall think proper.⁴⁵

(2) A tenant for life, unless he have a special power for that purpose, can make no leases to continue longer than his own life, for they are absolutely void at his death; and such a lease cannot be set up by the acceptance of rent from the tenant holding under it by the remainder-man, or his suffering such tenant to make improvements after his remainder vests in possession; but should the remainder-man however suffer such tenant to expend money in rebuilding, he being presumed to be cognizant of the fact, he will then be prevented by a court of equity from controverting such lease.

(3) If a tenant for life have power to make leases which may continue beyond his life, such leases, provided they are in strict accordance with the terms of the power, will be binding upon the remainder-man. A tenant for life, who has a power to make leases for three lives, or twenty-

(45) The Trustee Act, 1 Wm. IV., c. 60, § 17, contained a similar provision. This Act, however, is abolished by 13 & 14 Vict., c. 60, and more extensive powers enacted by its sections 16 & 29.

one years, cannot make such leases by letter of attorney by virtue of his power ; because such leases not being derived out of the interest of the tenant for life, but by an authority originating from the tenant in fee, and charging the estate of third persons, the trust for that purpose is personal, and cannot be delegated to another.

(4) A tenant for life is entitled, in the absence of any express agreement to the contrary, to reasonable estovers or botes, *i. e.*, housebote, ploughbote, and haybote. This is an exclusive privilege, and not a commonable right. Since he is bound to keep the buildings in repair, he may fell timber for such purposes ; but if he sell the timber, it is waste, even though he apply the money obtained from such sale to repairs. He may work open mines, and new shafts or pits, to pursue the old veins ; but if he open a new mine, it is waste. Converting one species of land into another is also waste, and so is cutting down decayed timber.

(5) A tenant for life, without impeachment of waste, may open mines and fell any timber on the estate, except ornamental timber, and convert it to his own use, and is entitled to all timber blown down ; but he cannot maliciously waste the estate, for the privilege from impeachment of waste was never intended to allow the very destruction of the estate itself, but only to excuse from permissive waste, and courts of equity will restrain, by special injunction, such waste as is likely to cause a permanent injury to the inheritance.

(6) Every tenant for life has *primâ facie* a right to the custody of the title-deeds of his estate, in order more perfectly to enjoy his right to the possession of it ; but if there be any evidence of spoliation, to the detriment of expectant interests, the Court of Chancery would order them to be deposited in court for safe custody, and for the protection of those in remainder or reversion.

(7) A tenant for life is not bound to pay off any charges or incumbrances on the inheritance; but if he do so he becomes a creditor on such inheritance for the sum so paid; for otherwise he must be supposed to have paid it for the benefit of those entitled to the inheritance; he must, however, keep down the interest on such charges.

(8) A tenant for life or his representatives are entitled to emblements in all cases where the estate is determined either by the act of God or of the law, between the period of sowing and the severance of the crop, for the public being interested in the production of corn and grain, some such encouragement is necessary to be given to husbandry; for otherwise if the emblements followed the lands, no tenant would lay out his money for the benefit of others, his representatives receiving no compensation for his labor and expense in cultivating the land. But if the estate be determined by the tenant's own act, then there shall be no emblements.

The same rule applies to the under-tenants or lessees, for they have not only the same privileges respecting emblements, but in some instances greater; for if the tenant for life determine the estate by his own act, it shall not prejudice his under-tenant, who cannot be answerable for it, and therefore he has a right to the emblements.

§ 5 (b) *For the life or lives of others.*

1. Its description.—2. The statutes affecting it.—3. Its incidents.

Its description.

1. This is the other of the two conventional estates, being the least estate of freehold which the law acknowledges; for an estate for the life of another is not so great an estate as that for one's own life. Where a person holds an estate during the life of another, he is called tenant *pour autre vie*, and the person upon whose life the estate

depends, the *cestui que vie*, or if more than one, *celles que vie*. The estate must be created by express words, and cannot arise by implication. The estate may be limited over by way of remainder, executory devise, or future use, and in effect may be entailed, but any alienation of the *quasi* tenant in tail will bar not only his issue but those in remainder. Though this estate be a freehold, it may be limited to the executors and administrators of the tenant *pour autre vie*, as well as to his heirs; for such tenant dying in the lifetime of the *cestui que vie*, his successors take as special occupants⁴⁶ during the remainder of the life of the *cestui que vie*, and not by descent. Although the estate be limited to the heir as special occupant, there is neither curtesy nor dower of it. If the tenant or his successors hold over after the death of the *cestui que vie*, the estate becomes a tenancy at sufferance.

2. The Wills' Act, 1 Vict., c. 26, § 3, enacts, that the power of disposition by will shall extend to "any estate *pour autre vie*, whether there shall or shall not be a special occupant thereof." Section 6 re-enacts the provision of

The statutes affecting it.

(46) Anciently, when lands were given to A. for the life of B., if A. or his assignee happened to die in B.'s lifetime, the estate belonged to the first person who could take possession, whoever he might be; and such person was called an occupant. But if the gift were to A. and his heirs for the life of B., or if A. in the former case had assigned his estate to another person and his heirs, this title by occupancy was precluded. The heir indeed who succeeds to such an estate is commonly called a special occupant; but the better opinion seems to be that he takes by descent; for the estate, though not an inheritance or fee, (and therefore not subject to curtesy or dower, nor capable of being entailed,) is a descendible freehold.

If such an estate be given to A. and the heirs of his body, it will descend, during its continuance, in the same manner as an estate tail, unless prevented by alienation; but this alienation may be made by any mode of conveyance, except perhaps by a devise by will: and it is settled that if there be an ulterior limitation of the same estate, analogous to a remainder expectant on the failure of A.'s issue, the alienation of A. (the *quasi* tenant in tail) will extend to this also.

It has also been held that the estate might be given to A., his executors and administrators; these representatives, however, it is clear, must take it in the character of special occupants.—Burt Comp. pl. 730, 731, 732, & 733.

the Statute of Frauds (29 Car. II., c. 3, § 12), and also that of the 13 Geo. II., c. 20, § 9, and, supplying the deficiencies of those enactments, comprises estates *pour autre vie*, in incorporeal hereditaments, and in real estate of every tenure. It provides that if no disposition by will shall be made of any estate *pour autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and should there be no special occupant of any estate *pour autre vie*, whether freehold or customary freehold, tenant right of customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy, or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as personal estate of the testator or intestate.

Its incidents. 3. The incidents to this estate are similar to those of an estate for life, but, of course, leases granted by a tenant *pour autre vie*, determine upon the death of the *cestui que vie*, and not on his own death.

§ 6 (c) *Tenancy in tail after possibility of issue extinct.*

1. How it arises.—2. Its incidents.

How it arises. 1. This estate arises out of a special entail, when the express condition has become impossible by reason of death. Thus, if an estate be granted to husband and wife, and their issue male or female, if either of them die without issue, the survivor is tenant in tail after possibility of issue extinct; and even if there have been issue, yet if the issue

die without issue, then the surviving parent is also such a tenant; and also if an estate be entailed upon a man and his issue from a particular wife, if she die without issue, the interest of the husband becomes reduced to a tenancy in tail after possibility of issue extinct. Only a donee in tail special can become such a tenant, for if the entail be general, such a tenancy can never arise; for whilst he lives he may have issue, the law not admitting the impossibility of having children at any age. As an estate-tail is originally carved out of a fee-simple, so this estate is carved out of a special tail.

There may be tenant in tail after possibility of a remainder as well as of a possession. And thus, if a lease for life be made, remainder to husband and wife in special tail, and the husband die without issue, now is the wife tenant in tail after possibility of this remainder; and if the tenant for life surrender to her, as he may, (an estate for one's own life being greater than an estate for the life of another,) now is she tenant in tail after possibility in possession (*Lewis Bowles's case*, 11 Co. 81 a).

This estate must be created by the act of God—death; it cannot arise out of any arrangement of parties, but *ex dispositione legis*, and not *ex provisione hominis*; if, therefore, an estate be given to husband and wife, and the heirs of their bodies, should they afterwards be divorced *causâ præcontractûs vel consanguinitatis vel affinitatis*, their estate is converted into a joint estate for life, and not into a tenancy in tail after possibility of issue extinct, because their estate has been altered by their own act, and not by the act of the Deity. Such a tenancy can endure only for the life of the surviving donee in tail, who has no power under the 3 & 4 Wm. IV., c. 74, § 18, to bar the remainders or reversion over, and if he convey his interest to another, such other will be only a tenant *pour autre vie*, and would be punishable for waste.

Its incidents. 2. The attributes of this estate are these :—

- (1.) The tenant is punishable for waste ; he may, therefore, not only commit it, but also convert to his own use the property wasted.
- (2.) The estate is liable to forfeiture.
- (3.) It will merge in a greater estate.
- (4.) The reversioner or remainder-man shall be received upon the tenant's default.
- (5.) An exchange with a tenant for life is good, the interests being deemed equal.

§ 7 (d) *By the curtesy of England.*

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|---|---------------------------------------|------------------------------|
| 1. Its description. | 3. Who may be tenants by the curtesy. | |
| 2. The four circumstances which must concur to create it. | | 4. Powers of the tenant. |
| | | 5. Derivation of the estate. |

Its description.

1. This estate by favour of the law of England arises by act of law, and is that interest which a husband has for his life in his wife's fee-simple or fee-tail estates, general or special, after her death.

The four circumstances which must concur to create it.

2. There are four circumstances necessary to the existence of this estate :—

- (1.) A canonical or legal marriage.
- (2.) Seisin of the wife ; as to corporeal hereditaments, it must be a seisin in deed, either actual or virtual,⁴⁷ but as to incorporeal hereditaments, a seisin in law is sufficient, where a seisin in deed is impossible.⁴⁸
- (3.) Birth of issue, alive and during the mother's existence.⁴⁹ It is immaterial whether the issue live or die, or whether it be born before or after the

(47) Co. Litt. 29 a, n. 3 ; 8 Co. 96 a.

(48) *Ibid.* The maxim is *impotentia excusat legem*.

(49) Painc's case, 8 Co. 34.

wife's seisin. If a woman inheritable marries, has issue, her husband dies, and she takes another husband and has issue, which dies, and then the wife dies, the second husband shall be tenant by the curtesy, though the issue by the first husband be living.

- (4.) Death of the wife. The husband's title to the curtesy is initiated at the birth of issue, and consummated at the death of his wife. No entry is necessary to complete this estate.

It is to be observed that by the custom of gavelkind, a husband may be tenant by the curtesy, without having had any issue by his wife. This curtesy is only of a moiety of the wife's lands, and ceases if the husband marry again.

3. All persons capable of taking freehold estates may be tenants by the curtesy; but aliens cannot, nor a person attainted of felony, unless he have issue by his wife after pardon.⁵⁰ A condition to restrain the husband of a femedonce in tail from curtesy is repugnant and void.⁵¹

Who may be tenants by the curtesy.

4. A husband may be tenant by the curtesy in a fee-simple or fee-tail estate, which is held in coparcenary or in common, for in each of these the inheritance is executed in possession; also in trusts and other interests, which, though in law mere rights and titles, are deemed estates in equity, and also in advowsons, rents, and commons. But there cannot be a tenant by the curtesy in the following interests:—

Powers of the tenant.

At the common law, if lands had been given to husband and wife, and to the heirs of their two bodies begotten, and they had issue, and the husband died, and she took another husband, and had issue, the nature of the gift was

(50) Co. Litt. 30 b., n. 7.

(51) Co. Litt. 224 a.

so far changed by their having issue, that the land then became descendible to all the heirs of the body of the wife by any other husband, and liable to the curtesy of such husband. To prevent this, it was provided by the statute *De Donis*, that where lands were given in this manner, a second husband should not be tenant by the curtesy, nor his issue inheritable.

If lands be given to a woman and to the heirs male of her body, and she marries and has issue a daughter only, and dies, her husband shall not be tenant by the curtesy; because the daughter by no possibility could inherit the mother's estate in the land.

As no estates in land are subject to curtesy but those of inheritance, wherever the inheritance is held to have never been vested in the wife, the husband cannot be tenant by the curtesy. For it is a rule in the case of a tenancy by the curtesy, as well as in a tenancy in dower, that the estate shall come out of the inheritance, and not out of the freehold. Estates held in joint-tenancy are not subject to curtesy. Where an estate is given to two sisters, and the heirs of their bodies, and one marries and has issue and dies, her husband shall not be tenant by the curtesy, because the estate of the surviving sister intervenes, and the estate tail was never executed in possession. A man cannot be tenant by the curtesy of lands which are assigned to a woman for her dower. This follows from dower not being an estate of inheritance. For the same reason a woman cannot have dower of lands of which a man is tenant by the curtesy. Lord Coke says, "A man shall not be tenant by the curtesy of a reversion or remainder expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture. The reason is, that there was no seisin of the freehold. It would be otherwise of a reversion in remainder expectant upon a lease for years, because there

the wife is seised of the freehold. Copyhold estates are not liable to curtesy, unless there be an express custom to warrant it."

5. The husband, from the moment of the child's birth, or of the acquisition of the property by his wife (whichever last happens), is enabled to convey an estate for his own life; before the birth of a child, he can convey a good estate for the joint lives only of himself and his wife. If he make a lease for years, reserving rent, and die, the lease is absolutely determined, so that no acceptance of rent by the heir or those in reversion, can make it good, for though his estate is *quodam modo* a continuance of the wife's estate, yet it is a continuance of it only for life, and he has no power to contract for or intermeddle with the inheritance; and, consequently, his lease falls off with the estate whence it is derived, and the lessee becomes tenant at sufferance by the continuance of possession afterwards. An estate by the curtesy, in respect of the estate tail, or of any prior estate created by the settlement, as well as a resulting use or trust to or for the settlor, is to be deemed a prior estate under the settlement within the contemplation of the Fines and Recoveries' Act (3 & 4 Wm, IV., c. 74, § 22) appointing a protector; the husband would therefore be the protector of the settlement.

Derivation of
the estate.

Though this estate is styled the curtesy of England, it appears to have been the established law of Scotland, where it was called *curialitas*; and it is likewise observed in Ireland by virtue of an ordinance of Henry III., and the doctrine was recognised among the Romans.

It is not very easy to account for the name, "tenant by the curtesy of England;" Littleton's explanation of it, viz., "because this is used in no other realm but in England only,"⁵² being obviously incorrect, since the law that

(52) Litt. s. 35.

a husband who had issue, should retain the lands of his deceased wife during his life, prevailed among many of the northern nations.⁵³ Sir Thomas Craig calls it *curialitas*;⁵⁴ from which Blackstone infers, that, “probably our word *curtesy* was understood to signify rather an attendance upon the lord’s *court* or *curtis*, (that is, being his vassal or tenant,) than to denote any peculiar favour belonging to this island; and therefore it is laid down, that by having issue, the husband shall be entitled to do homage to the lord, for the wife’s lands, alone; whereas, before the issue had, they must have both done it together.”⁵⁵ But as ideas or facts exist before they are named, the order of the cause and effect expressed by the “therefore” at the beginning of the last sentence is probably the reverse of the true one. That is, it was not laid down, that by having issue, the husband should be entitled to do or receive homage, alone, *because* the word *curtesy* signified attending or holding a court baron; but the word *curtesy* was applied to this species of tenure, *because* the distinguishing incident (the *differentia*) of it was that *after issue had the husband should do or receive homage, in right of his wife alone*.⁵⁶

Some English writers⁵⁷ ascribe it to Henry the First: but Nathaniel Bacon⁵⁸ calls it a law of counter-tenure to

(53) Lindenbrog. L.L. Alamann. tit. 92, Grand Coustum, c. 121. It is likewise used in Ireland by virtue of an ordinance of King Henry III., and Scotland, as we have just seen.

(54) Crag. lib. 2, c. 22, s. 40. He says, “Angli *curialitatem Anglicanam* vocant, quasi ea apud solos Anglo locum haberet; sed fallantur, nam et apud nos et Normannos huic *curialitati* locus ist, imo ejus origo ex jure civili non incommode deduci potest. Ex Constantini enim rescripto sancitum est, ut hereditatis maternæ pater usum fructum, filii proprietatem haberent.” L. 1, C. de bonis maternis. Sir Martin Wright quotes Craig’s conjecture as the “most rational he had met with.”—Law of Tenures, 195.

(55) 2 Com. 126; Co. Litt. 30 a. The same is true as to receiving homage in the case of a seigniorie. See Co. Litt. 67 a.

(56) Bisset on Life Estates, c. 3.

(57) Mirror, c. I. s. 3.

(58) Bac. Government, 4to. 1647, p. 105.

that of dower, and yet supposes it as ancient as the time of the Saxons, and that it was therefore rather restored by Henry the First than introduced by him. But there are no notices of this curtesy among the laws of the Saxons, nor among those we have of Henry the First.⁵⁹

§ 8 (e). *In Dower.*

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| 1. Its description. | 6. Report of the Real Property Commissioners. |
| 2. The three circumstances which must concur to create it. | 7. An exposition of the Dower Act. |
| 3. The estates not subject to dower. | 8. CHATTEL-INTERESTS—their description. |
| 4. A jointure and its six requisites. | 9. Division of them. |
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1. This estate also arises by act of law, being that right Its description. which a wife (not being an alien, unless she be naturalized or made a denizen) has in the third part of the lands and tenements of which her husband dies possessed in fee-simple, fee-tail general, or as heir in special tail,⁶⁰ which she holds from and after his decease, in severalty by metes and bounds, for her life, whether she have issue by her husband or not, and of what age soever she may be at her husband's decease, provided she be past the age of nine years. Her husband's age does not affect the estate.

2. The circumstances necessary to create dower are,

1st. Marriage, which must be duly celebrated between parties canonically qualified to enter into such a contract, in conformity to the maxim, *ubi nullum matrimonium, ibi nulla dos*. But if the marriage be dissolvable *à vinculo matrimonii*, and it be not annulled in the lifetime of the husband, the wife will be entitled to her dower. A divorce *à mensâ et thoro* only, will not cause the forfeiture of

The three circumstances which must concur to create it.

(59) Chambers on Estates, c. III. p. 92.

(60) A widow is dowable out of a reversion expectant on a term for years, because her husband was seised of the freehold and inheritance.

dower, except when it is for adultery, accompanied by elopement.⁶¹ The fact of marriage is proved by the bishop's certificate.

2d. That the husband must be seised in law of the estate out of which the wife claims dower, if the marriage were solemnized on or *before* the 1st January, 1834, for seisin is since rendered unnecessary by the Dower Act, which shall be presently explained ; and

3d. The wife's inchoate title to the estate is consummated by her husband's death, when her right of action commences.

The estates
not subject to
dower.

3. Estates held in joint-tenancy are not subject to dower, since in them the inheritance is not executed in possession, on account of the right of survivorship.

A woman is not dowable of a wrongful estate after it is avoided, by the entry or action of the person having right, or by the operation of the law of remitter.⁶² For though titles of dower attach upon estates of inheritance, notwithstanding those estates are defeasible, by reason of defect of title, yet dower being an interest annexed to the defeasible estate, when the estate is defeated, all its consequences are defeated along with it.⁶³

Lands assigned for dower are not subject to dower, *dos*

(61) In *Sidney v. Sidney*, 3 P. Wms. 269, it was said by Lord Chancellor Talbot : "The reason of the difference why a wife, in case of an elopement with an adulterer, forfeits her dower, and yet the husband, leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy, is, because the statute of Westminster 2, cap. 34, does by express words, under these circumstances, create a forfeiture of dower ; but there is no act inflicting, in the other case, the forfeiture of a tenancy by the curtesy."

(62) Remitter is where he who has the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent, and, of course, defective title ; in this case he is remitted or sent back, by operation of law, to his ancient and more certain title. The possession which he has gained by a bad title shall be *ipso facto* annexed to his own inherent good one ; and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent.

(63) Park on Dower, 57.

de dote peti non debet. But the rule of *dos de dote peti non debet* only applies where dower is actually assigned. Copyholds, having been originally estates determinable at the will of the lessor, did not confer a title to dower upon the wife of the tenant; though, by the custom of some manors, the wife of a copyholder is entitled, on proof of the existence of the custom, to an interest called freebench in the copyhold tenement, on her surviving her husband, analogous, in its general outline, to that of a dowress at the common law. A woman shall not be endowed of a common *sans nombre*; for otherwise, it was said, the common would be overstocked.

4. The original law of dower became among our ancestors, with the increase of alienation, highly inconvenient and obstructive of the free course of conveyances. The legislature, by the 27 Hen. VIII., c.10, (the Statute of Uses,) set about a method of diminishing the evil by providing a *jointure* in lieu of *dower*. By effect of this statute no widow can claim both jointure and dower. Jointure, in its strict acceptance, meant a joint estate, limited to both husband and wife; but it is now understood to be a sole estate, limited only to the wife. To a strict legal jointure these six things are requisite;—

A jointure
and its six
requisites.

(1.) The provision for the wife must take effect in possession or profit immediately after her husband's death.

(2.) It must be for her own life at least, and not *pour autre vie*, or for any term of years, or for any smaller estate. But the widow will be bound by the acceptance of a precarious interest if she were adult at the time she agreed to the jointure.

(3.) It must be made to herself, and no other in trust for her.

(4.) It must be made in satisfaction of the whole, and not of part of her dower.

(5.) It must be either expressed or averred to be in satisfaction of dower ; and

(6.) It may be made either before or after marriage ; if made *after* marriage, she may waive it, and claim her dower, unless it be provided by Act of Parliament.

The uses to
bar dower.

5. But this statutable substitution was found frequently impracticable, and recourse was had to many ingenious devices to prevent or defeat dower, but they were all more or less imperfect, and at length gave way to the universal practice of taking a very artificial form of conveyance, which obtained the name of a conveyance to uses to bar dower. The land was, therefore, now conveyed to such uses as the owner should appoint, and in default of appointment, to him for life, and on the determination of his estate in his lifetime, to a trustee and his heirs for the life of the owner, in trust for him, and on the determination of the estate of trustee, to the owner and his heirs.⁶⁴

An equitable bar of dower was deemed sufficient as between vendor and purchaser ; as if a wife contract before marriage to relinquish her dower, either in consideration of a substituted provision, or of marriage, which is valuable in itself, and the highest consideration known to the law.

Report of the
Real Property
Commissioners.

6. "The general result is" as the Real Property Commissioners reported, "that the right to dower exists beneficially, in so few instances, that it is of little value considered as a provision for widows, and we believe it may be confidently asserted, that it is never calculated on as a provision by females who contract marriage, or their friends : yet there is so much of uncertainty in the modes by which dower is prevented, that the actual or possible existence of the right is a very frequent and serious impe-

(64) See note (66) p. 65, *post*.

diment to the transfer of property, and the ascertaining in each case that it does not exist in the widows of any of the persons through whom the property has passed, or procuring the necessary acts to be done for preventing or barring it, where it does or may exist, or securing the future production of the evidence of its non-existence, are the causes of frequent and great delay and expense attending such transfers. Thus where there is no person who can derive any benefit from the law of dower, that law exists often as a clog to the transfer of property, sometimes as a legal pretext for delaying the performance of a contract, and sometimes as the inevitable cause of, or a mischievous temptation to, litigation. Generally we conceive that the right to dower may be said to exist to the injury of proprietors and purchasers, and to a comparatively small extent for the benefit of widows, and to some extent also to their injury, in leading them into, or involving them in, litigation.

“The true principle (as we think) on which the law of dower was originally established, and on which it has a claim on grounds of justice and policy (without sacrificing the general convenience) to be supported, is, that it should be considered as that interest in an estate of inheritance which the law takes from the heir of a deceased proprietor for the support of his widow, whose claims, in natural justice and policy, appear to stand at least on an equal footing with the claims of the heir; it is so far analogous to the provision which a law, established in more modern times, has made for the widow out of the husband's personal estate undisposed of by his will. By combining this principle with another of high and perhaps paramount importance, a principle which the law has carefully established almost to its fullest extent, viz., that a right of alienation should be inseparably incident to property of every description, we think that the law of dower may be

put on a footing more beneficial on the whole to widows, and free from nearly all the present inconveniences and mischiefs.”

An exposition
of the
Dower Act.

7. This report led the way to the passing of the Dower Act, the 3 & 4 Wm. IV., c. 105, which places every wife's hope of dower entirely at the mercy of her husband.

The first section is the glossary clause, and enacts, “that the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall, in this act, *except* where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows:—

“Land,” to extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof.

Every word importing the singular number only, to extend and be applied to several persons or things, as well as one person or thing.

When a husband dies *beneficially* entitled to any land for an interest not dowable at law, and such interest, *whether wholly equitable, or partly legal and partly equitable*, is an estate of inheritance in possession, or equal thereto (other than estate in joint-tenancy), his widow is entitled, *in equity*, to dower out of the same land (§ 2).

This section has abolished a great anomaly. Dower is considered as a mere *legal* right, and did not attach unless the husband was, during the coverture, solely seised in possession of the legal inheritance: it was held, therefore, that equity ought not to create the right where it did not subsist at law, and that a wife was not dowable of a trust estate. Yet a man might then, as now, be tenant by the curtesy of his deceased wife's trust estate; a seeming partiality, for which Lord Chancellor Talbot said, he could

see no reason, but which, as he found it settled, he did not feel himself at liberty to correct. This distinction is abolished, and dower is made to attach, in equity, upon the beneficial interest in possession of a sole owner of the inheritance, whether the ownership be exclusively equitable, or be in part composed of a legal estate enjoyed beneficially.

When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof; she may have dower out of the same, although her husband have not recovered possession thereof, provided the dower be sued for or obtained within the period during which such right of entry or action might be enforced (§ 3), which period is now limited, by the 3 & 4 Wm. IV., c. 27, to twenty years.

Before this act, a seisin was necessary, as we have seen, but a seisin in law was sufficient, *i. e.*, where the inheritance in lands and hereditaments, of which a man died seised or possessed, descends upon his heir, who dies before entry or possession; if the heir had left a widow, she would have had dower.

No widow shall be entitled to dower out of any land which shall have been *absolutely disposed* of by her husband in his lifetime or by his will (§ 4). And that all *partial* estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, are valid and effectual as against the right of his widow to dower (§ 5). A widow shall not be entitled to dower out of any land of her husband when, in the deed by which it was conveyed to him, or by any deed executed by him, it shall be *declared* that his widow shall not be entitled to dower out of such land (§ 6). A widow shall not be entitled to dower out of any land of

which her husband shall die wholly or partially intestate, *when*, by his will, he declares his intention that she shall not be entitled to dower out of such land, or out of any of his land (§ 7). The widow's right to dower shall be subject to any conditions, restrictions, or directions, which shall be declared by her husband's will (§ 8). Where a husband devises any land out of which his widow would be entitled to dower, if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, she shall not be entitled to dower out of or in any land of her husband, unless a contrary intention appear by the will (§ 9).

In these sections consist the essential alterations made by this act, which puts the widow's dower altogether in the husband's power. It used to be a principle, that, after a title to dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge, whether voluntarily, as by deed or will, or involuntarily, as by bankruptcy, &c.; and that, therefore, all interests created by the husband after the attachment of title to dower, were voidable as to that part of the land which was recovered in dower.

The fourteenth section enacts, "that this act shall not extend to the dower of any woman who shall have been, or shall be married on or before the 1st January, 1834, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st January, 1834, the effect of defeating or prejudicing any right to dower."

There is great obscurity in this section, and it gave rise to two serious questions. The one was, whether a title to dower was within the Fines and Recoveries' Act, so that a woman married on or before the 1st January, 1834, could extinguish her title by a deed acknowledged under the act? and it has been long settled that, in every case

requiring the wife's conveyance, the substituted assurance, under the 3 & 4 Wm. IV., c. 74, applies. The other question was, whether the dower of a woman married *on or before* 1st January, 1834, out of lands purchased by the husband *after* that day, may be excluded by a declaration, alienation, &c., under the Dower Act? The sound opinion seems to be, that the new law was made exclusively for women *married after* the 1st January, 1834, and, therefore, inasmuch as the titles to dower, attaching after 1st January, 1834, of women married on or before that day, cannot be defeated by a declaration or otherwise, under this act; it follows as a reasonable consequence, that such women cannot claim dower out of *equitable* estate under the second section of this act. This saving clause, which continues to a large class of wives the old provisions, will have the effect of prolonging the practice of inserting limitations to prevent dower, in order to render the fact of marriage on or before the 1st January, 1834, immaterial to the future title. In practice, the ordinary uses to prevent dower are inserted, together with the declaration. Mr. Fearne invented these uses. He suggested them in his *Essay on Contingent Remainders*.⁶⁵ "The case of *Duncomb v. Duncomb*, (3 Lev. 437), suggests a mode of preventing dower's attaching upon purchased lands; which, at the same time that it puts the whole estate completely in the purchaser's power, without any recourse to the trustee, vests the legal freehold in him solely, and on his decease leaves the legal inheritance to his heir, absolutely discharged from the medium of any trust. For this purpose, the lands may be limited to the use of his appointees, &c. (in the fullest manner), and in default of appointment, to the use of him and his assigns during his life; and from and after the determination of that estate, by any means in his lifetime, to the use of some person

and his heirs, during the natural life of the purchaser, in trust for him and his assigns; and from and after the determination of the estate so limited in use to the said trustee and his heirs, to the use of the purchaser, his heirs and assigns for ever."

"It is usual," observes Sir Edward Sugden, in his *Treatise on the Law of Vendors and Purchasers*, (Vol. II., p. 222, 10th edit.) "in *all* cases of conveyances to a purchaser, to insert a declaration depriving his wife of dower, even when there is a limitation to bar the dower of a wife married on or before the 1st of January, 1834, in order to provide against a future marriage; but this practice, without express instructions, seems not to be correct: it was quite correct to prevent dower from attaching, whilst the husband's power of disposition, either by act *inter vivos*, or by will, was inoperative against his wife's dower; but now that he can charge, sell, convey, or devise his estate free from dower, or put an end to it by any deed, it would not be right, without the owner's authority, by a declaration in the conveyance to prevent dower altogether. Why should the wife's dower be guarded against any more than a descent to a distant unknown relative? Neither can take contrary to the owner's disposition. The Real Property Commissioners, in their first report, state the true principle on which the law of dower is to be supported to be, that it is an interest which the law takes from the heir of a deceased proprietor for the support of his widow, whose claims in natural justice and policy appear to stand at least on an equal footing with the claims of the heir, and they thought that by combining this principle with that of a right of alienation inseparably incident to property of every description, the law of dower might be put on a footing more beneficial on the whole to widows, and free from nearly all the then existing inconveniences and mis-

chiefs. These considerations may induce conveyancers not as a matter of course to deprive a wife of her chance of dower. If the owner allow his estate to descend, the claim of the widow is equal to that of issue, and superior to that of a lineal ancestor or a distant relation."⁶⁶

The tenth section enacts, that no gift or bequest made by any husband to or for the benefit of his widow, of or

(66) As the subject is of great importance, and of daily occurrence in practice, it may be convenient to place here, side by side, the old form and the new :—

The Old Form—to be used where the purchaser was married before the 2d of January, 1834.

To such uses, upon such trusts, and to and for such ends, intents, and purposes as the said purchaser shall by any deed or deeds, with or without power of revocation, from time to time direct, limit, or appoint; and for default of and until such direction, limitation, or appointment, and so far as every or any such direction, limitation, or appointment, if incomplete, shall not extend, to the use of the said purchaser and his assigns during his life, without impeachment of waste; and from and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of the said A. B. (trustee), and his heirs, during the life of the said purchaser, in trust for the said purchaser and his assigns during his life, and to prevent any wife of the said purchaser from being entitled to her dower out of or in the premises or any part thereof, and immediately after the determination of the estate hereinbefore limited to the said A. B. (trustee) and his heirs during the life of the said purchaser, to the use of the said purchaser, his heirs and assigns, for ever.

The New Form—where the purchaser is unmarried, or has married since the 1st of January, 1834.

To such uses, upon such trusts, and to and for such ends, intents, and purposes as the said purchaser shall by any deed or deeds, with or without power of revocation, from time to time direct, limit, or appoint; and for default of and until such direction, limitation, or appointment, and so far as every or any such direction, limitation, or appointment, if incomplete, shall not extend, to the use of the said purchaser, his heirs and assigns, for ever.*

* It is of importance to remark that the old common form, with the omission of the words "and to prevent any wife of the said purchaser from being entitled to her dower out of or in the premises or any part thereof," will have the same effect *quoad* dower as the new, with the additional advantage of rendering it unnecessary to prove that the marriage took place *after* the 1st of January, 1834.

out of his *personal* estate, or of or out of any of his land *not liable to dower*, shall defeat or prejudice her right to dower, *unless* a contrary intention be declared by his will.

Acceptance of a bequest of personalty neither did, nor, since this act, does operate in bar of dower, unless an intention to that effect can be unequivocally established.

Nothing in this act prevents the Court of Equity enforcing any covenant or agreement, entered into by or on the part of the husband not to bar his widow's right to dower out of his lands, or any of them (§ 11); so that it should be ascertained by a purchaser of an estate free of dower, under this act, that the vendor has not entered into any agreement *not* to bar his widow's dower.

Also, that nothing in this act is to interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows, in satisfaction of dower, are entitled to priority over other legacies (§ 12).

The principle alluded to in this clause is, that where a general legacy is given, in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, inasmuch as such a bequest cannot be treated as a bounty, like other bequests, but as the purchase money for such right or interest, payment of it will be preferred to any other general legacies, which are merely voluntary, and, therefore, a legacy given to a widow in satisfaction of dower, does not, in the event of a deficiency of assets, abate in proportion to the other legacies. This principle, however, only applies to cases where, on testator's death, his widow is entitled to dower.

No widow is now entitled to dower *ad ostium ecclesiæ*, or *ex assensu patris* (§ 13). Dower *de la plus belle*, being a consequence of the tenure by knight's service, is virtually abolished by the statute (12 Car. II., c. 24), which converts those tenures into socage. There are then only two species of dower out of five which are left, viz.:—Dower at the

common law, or *ex provisione legis* (which we are now treating of), and customary dower, or freebench.⁶⁷

Dower, *ad ostium ecclesiæ*, was this:—Where tenant in fee-simple of full age, openly, at the church door (where all marriages were formerly celebrated), after affiance made, and troth plighted between them, endowed his wife with the whole, or such quantity of his land as he pleased, specifying and ascertaining the same; on which the wife after her husband's death, might have entered without further ceremony. Dower, *ex assensu patris*, was a species of dower *ad ostium ecclesiæ*, which was made during the husband's father's life, and the son, by the father's consent expressly given, endowed his wife with parcel of his father's lands. Dower *de la plus belle* was where the wife was endowed with the fairest part of her husband's estate.

Although the right to dower is consummated upon the husband's death, yet the widow has no estate in the lands until the heir assigns the dower, unless the precise portion of land has been particularly specified. If the property be capable of division, and was held by the husband in severalty, dower must be assigned by metes and bounds, but if otherwise, it must be done in a special and certain manner. If the heir or terre-tenant refuse to assign the dower, the widow has several remedies for recovering it. Where no dower has been assigned, the original writ of dower *unde nihil habet* will lie, but if any part have been assigned, the writ of dower will lie. The widow may file a bill in Chancery, for she labours under so many difficulties at law, from the embarrassment of trust terms and other matters, that equity will fully assist her not only in establishing her right at law, but also in completely relieving, when such right is ascertained.

No arrears of dower, nor any damages on account thereof, are recoverable by action or suit, for more than six years

(67) This will be treated of in the Tractate on Copyholds.

next before the commencement of such action or suit, by 3 & 4 Wm. IV., c. 27, § 40.

Chattel-interests—their description.

8. Having discussed the several species of estates ranging under the two first orders of our classification, those, which are comprehended under the third and last order, viz., CHATTEL-INTERESTS, only now remain for observation.

Chattel-interests are the most inferior order of estates, and in the old time, when feudality flourished in all its stern and frowning grandeur, the little interests of the humble cottager and the labouring farmer in the soil of England were treated with contempt and trampled upon. But in these latter days, when the increase of knowledge has expanded commercial enterprise, and awakened the sleeping energies of the mass of the people, these minor properties are properly respected, and their value and importance much increased.⁶⁸

(68) Preston (Est. p. 604, 1st edit.) remarks, "Interests of this sort were formerly of very little estimation in the law. They were considered as depending upon contract for the possession. Hence a variety of differences between estates of chattel quality and estates that give a freehold interest. An estate of freehold, though it may be defeated by a condition, at the will of a particular person, and, in point of limitation, cannot have continuance beyond the life of some individual, is, in construction of law, of greater extent and of higher consideration than an estate for 100, or even 1000 years, though the former of these periods is equal in length of time, according to human events, to the continuance of seven successive generations, deduced lineally from the same parent. This difference owes its origin to the nature of tenures, introduced into this kingdom by the feudal policy. Estates for years were under this system of little or no repute; nor were they of any value: they were held by men in the most abject state of slavery; by men to whom the will of the superior was a law. The person, the property, and even the life of these men were in the power of their lords; and, under these circumstances, it is by no means a matter of astonishment that an estate for years should be of so little value when compared with the estate of the freehold, since the one belonged to the lord and the other to his vassal, and the latter and all his property were in the power of the former."

Burton commences his chapter on chattel-interests in his Compendium thus:—"All the subjects of real property, which are generally alienable, may be made subjects of personal property also by creating a chattel-interest in them. These interests may be said to bear a similar relation to the freehold and inheritance to that which the surface bears to a solid: they differ not only in quantity, but in order or kind; and

The difference between freeholds and non-freeholds, or chattel-interests, consists, for the most part, in the fixity or non-fixity of their duration. It is the latter property, viz., uncertainty, that characterises a freehold; it is the former, viz., certainty, that characterises a non-freehold. Hence every tenancy of a definite duration is a term, *i. e.*, a period accurately ascertained during which the interest or estate is to endure. The non-freeholds are deemed merely chattel-interests, and differ from freeholds not only in quantity but in order and kind; for freeholds are considered of greater interest than non-freeholds, and therefore if a term of 1000 years and an estate for life vest in the same person, in the same right, the term will merge in the life estate, unless an intervening estate prevent such an union of interests.

9. Five⁶⁹ species of estates rank as chattel-interests:— Division of them.
 (a), for years; (b), from year to year; (c), at will; (d), by *elegit*; and (e), on sufferance.

accordingly whenever in the limitation of a settlement or otherwise a chattel-interest is followed by an estate of freehold, the latter is more properly said to be *subject to* than *expectant upon* the former. It is true that chattels and freeholds may have, either of them to the other, the relations of particular estates and remainders; but where the freehold is preceded by a chattel only, the freehold is *present* interest, not, if it be a remainder, in power of alienation only, nor, if it be a reversion, merely in power of alienation and right of seignory, but in most of the circumstances and incidents of title. Of so little account was the property of the inferior classes of society at the time when the principal rules of the common law were fixed. But in the progress of that law, chattel interests became of more importance; and being attended with the exclusive right of possession and usufructuary enjoyment, they are now, in proportion to their duration, (which may be indefinitely extended,) little inferior in value, if free from charges and without impeachment of waste, to estates in fee-simple. And therefore if we compare the inheritance to a solid, it may well be to the earth itself, of which in general no part is more esteemed than the surface. See more as to freeholds, *ante*, p. 39.

(6⁷) The old estates of statute-merchant and statute-staple are chattel-interests, for their duration is measured by the satisfaction of a debt. We have, however, omitted them, because they are now altogether obsolete. See them treated of in 2 Saund. Rep. 70, *et seq.* Burton (Comp. 282) observes that estates by statute merchant, statute staple, and *elegit*, are so far of the same kind, as their duration is measured by the satisfaction of a debt; but as the tenancy does not commence until an extent (*i. e.*, a valuation) of the tenements has been made by the proper authority, these estates seem to have all the certainty of continuance which is necessary to constitute a term of years.

§ 9 (a). *Term for years.*

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| 1. Its description.
2. How created.
3. The four times.
(1.) The time of computation.
(2.) The time of commencement in interest.
(3.) The time of continuance. | (4.) The time for the determination of the estate.
4. The divisions of terms.
5. Interesse termini.
6. The satisfied-term Act.
7. Incidents of this estate. |
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Its description.

1. This estate is denominated a term, because its enjoyment is strictly fixed, for by "term" is meant the interest, and not merely the period for which it is held. It is a chattel-real; chattel, because the estate passes to the

And accordingly, although the statutes to which they owe their origin, speak of the *seisin* of the creditor, and provide that if dispossessed he shall have his remedy by *assize*, yet it has been always held that such interests have the similitude only and not the nature of freehold.

The statute merchant, (for so the instrument itself is called, the form of which is prescribed by st. 11 Edw. I., amended by 13 Edw. I., st. 3,) the statute staple, (according to 27 Edw. III., st. 2, c. 9,) and the recognizance in the nature of a statute staple, (under st. 23 Hen. VIII., c. 6,) all agree in this, that they are recorded acknowledgments of a debt; which not being paid by a certain day, the sheriff is authorized to deliver the lands as well as goods of the debtor to the creditor "by a reasonable extent, to hold them until such time as the debt is wholly levied." And the liability extends to all the lands which the debtor had at the time of acknowledging the statute or recognizance, though he should afterwards sell or otherwise dispose of them, and to all which he may afterwards acquire.

These statutes and recognizances are now wholly disused; but whatever relates to the effect of a statute staple is still of practical importance, as being applicable to many cases where the Queen is creditor. For by st. 33 Hen. VIII., c. 39, s. 50, all bonds relating to the revenue are to be made to the Queen herself in a prescribed form, and being so made, are to have the effect of statutes staple. And by st. 13 Eliz., c. 4, all lands, tenements, profits, commodities and hereditaments which any of the treasurers, receivers, tellers, customers, collectors, farmers, officers, and accountants, there enumerated, shall have within the time whilst he shall remain accountable, shall be liable to, and shall be put and had in execution for, the payment of his arrearages, in like manner as if he had the day he became first officer or accountant, stood bound by writing obligatory, having the effect of a statute staple, for the payment of the same. But by s. 10, those persons are excepted, whose yearly receipt, or whose whole receipt, shall not exceed 300*l*.

Besides these recorded acknowledgments, the following transactions constitute chattel-interests:—A devise to executors for payment of debts, and until they are paid; the executors have a chattel-interest, which will go to the executors of the surviving executor, if the debts have not been fully satisfied: again, a grant of a rent, with a clause, giving a right of entry upon the land to take its profits until the satisfaction of any arrears, the entry gives a chattel-interest, determinable upon the discharge of all arrears.

owner's executors at his death, and not to his heir-at-law; so far, then, this estate partakes of the nature of personality; real, because it refers to the substance or land in which the interest may subsist, and, therefore, imparts to the estate the nature of real-property. An estate for years, then, is an interest in lands, tenements, and hereditaments for an ascertained period. It is to be observed that every estate of a determinate duration is a term, and of the nature of a term of years, though for a less period than a year, a year being the shortest time which the law in this case takes notice of.⁷⁰ Hence every term must have a certain beginning from which the computation is to be made, and a certain period beyond which it cannot endure.⁷¹ This estate may be made determinable on a life, or on any other contingent event,⁷² before the effluxion of the time named, as, to A for 99 years, if B live so long. Should B die before the 99 years expire, the estate will cease, but though B should survive the term, the estate, on the expiration of the 99 years, would be absolutely at an end.

2. This estate is usually created by a deed called a lease or demise under the common law, and the appropriate operative verbs therein are "demise, or grant lease, and to farm let;" but any words showing the intent of the How created.

(70) All interests of this sort, of whatever duration they may be, whether for a longer or shorter period than a year, are classed under the learning of estates for years; for as they are of the same nature and quality, and open to the same rules of construction, and the same remedies are adapted to the recovery of an estate for a month, as are proper to the recovery of an estate for years, the doctrine that applies to estates for years equally extends to estates for any other certain and definite time.

Therefore, when Littleton and Lord Coke speak of an estate for a month in point of time, as an estate for years, they allude to the quality of the estate, or its nature with respect to remedy; and not to the quantity of the tenant's interest. Though an estate for a month is of the quality of an estate for a year or a thousand years, it is, in quantity, an estate for one month only.—Prest. Est. p. 608, 1st edit.

(71) Bracton says, *Terminus annorum certus debet esse et determinatus*.—1 Inst. 45 b.

(72) A mortgage by demise is involved in this proposition; but, as the whole law of mortgages will be dealt with in a subsequent Tractate, we shall refrain from making any further remark upon the subject in this place.

parties that the one (the lessor) shall divest himself of the possession, and the other (the lessee) come into it for a determinate time, are generally sufficient for the purpose. It is to be remarked that while the term "demise" still implies an absolute covenant on the part of the lessor, or person leasing, for the lessee's or termor's quiet enjoyment during the term, which, however, may be qualified by a more limited express covenant; the word "grant" has no longer any such implied effect.⁷³

It is usual, though not necessary, to add the "executors and administrators" of the lessee, termor, or grantee, in analogy to "heirs" in the case of a fee, an analogy extending so far, that where any estate is given to a person, and an estate for years to his executors by the same instrument, the latter is held to vest also in himself.⁷⁴ It may, however, be created by other means, as by will, or by declaration of use.

The four times.

3. In every lease for years, there are four times to be considered :—

(1.) The time of computation.

The time of computation.

This marks the period whence the continuance of the estate is to be calculated. The time of computation may be either from—

- (a) A day past ;
- (β) The present time ;
- (γ) A day to come ;
- (δ) An event which is to arise ; or
- (e) It may be referred to a third person to name the time.

The time of commencement in interest.

(2.) The time of commencement in interest.

This marks the period at which the lessee or termor is to have the enjoyment of the property under the lease or limitation. This time must not be beyond the period allowed

(73) 8 & 9 Vict., c. 103, § 4

(74) Burton's Conn. 276

by the rule preventing perpetuity; *i. e.*, beyond a life or lives in being and twenty-one years afterwards; but it may be made to commence *in futuro*, as the estate does not affect the seisin, but only the possession. The times of computation and commencement may be the same, or they may be different, the first running from a day past, while the last must begin from a day to come, which is determined by the form of the limitation. No agreement can confer a title to an estate on a tenant for any period prior to the time when he actually acquired the estate. The time of commencement in interest, or the right of enjoyment, must be either from

- (a) The time present;
- (β) A fixed future day; or
- (γ) A given event.

A lease to hold generally, without particularising any time, or from a day that is past or henceforth, commences from the instant in which the deed is delivered or other act, which evidences the lease, is perfected. When the time of commencement is to begin from the present time, or from a fixed future day, it is absolute; if it depends upon a given event, it rests upon a contingency.

The usual forms of leases limit the time according to some one of the following circumstances:—

(a) Generally, without specifying any time of computation or commencement, when the term commences from the delivery of the lease, according to the inferred intention of the parties.

(b) From the day of the date or writing, which contains the lease of the term, or some evidence thereof, or from the making or sealing of the deed, or by the word “henceforth,”—all which phrases refer to the delivery of the lease.

(c) From the day of the date, which, of course, ex-

cludes the day of the date, (for the word "from" is privative, and excludes the day,⁷⁵) or from some day in particular.

(d) From the end of the term in particular, or from the end of the time comprised in a term. The word "term" refers to the continuance of the interest under the lease; the word "time" to the space of the term. This distinction is important, for if⁷⁶ a man make a lease for twenty-one years, and after make a lease to begin *à fine et expiratione prædicti termini annorum dimiss.* (from and after the end and expiration of the aforesaid term of twenty-one years demised) and after the first lease is surrendered, the second lease shall begin presently; but if it had been to begin *post finem et expirationem prædict.* 21 annorum (after the end of the said twenty-one years) in that case, although the first term had been surrendered, yet the second lease should not begin till after the twenty-one years be ended *by effluxion of time*, and so note the diversity between the term of twenty-one years and the time of twenty-one years.

(e) From an event, or one of several events.

When the time of computation is to run from the date of the deed, and it bears an impossible date, as the 34th day of November, or the 31st day of February, the words referring to the date will be rejected, and the time begin

(75) Between the expression from a day, and an act which happens within a day, there is this difference. As a day is, with reference to acts done in the course thereof, divided into several spaces of time, there is no inconsistency in taking the day of delivery into the computation, when the limitation is from an act which is performed within the day; because that act is done in a particular part of the day. But to make the day generally, the period from which the time of computation is to commence, is, to this purpose at least, to make the whole day an indivisible point of time, and to exclude every part of it. *From the day* and *from an act* which happens in the day, are two different periods. The one expression admits the divisibility of the time of a day, and includes in fact some part of it, and in law the whole of the same, and it is not the day itself but some act or event which happens in the course of the day, that is made the period of calculation. The other expression excludes the day itself, and makes the end of it (thereby excluding all the parts of the same) the time of computation.—Prest. Est. p. 630, 1st edit.

(76) 1 Inst. 45 b.; and Prest. Est. p. 633.

from the delivery of the deed. So, when a lease is made for years, to commence and be computed from the determination of a former lease supposed to be subsisting, when in truth there is no such lease, the lease thus granted will commence immediately, and the computation of the term made from the time of the delivery. But a distinction is drawn between an impossible date and one which is possible, and may happen in some year, though it will not happen in every year, as the 29th of February; in the first case, the estate commences immediately; in the last, the time referred to will happen in a Bissextile or Leap-year, the computation will then run from the first 29th of February after the making of the lease.

(3.) The time of continuance.

This must be for a period of certain duration, to be calculated by a given space of time, of arithmetical import, and measured by number. It is ascertained either

(a) By an enumeration of years, months, weeks, or days;

(β) By a reference to them; or

(γ) By passing a right which before it vests in interest is to be reduced to a certainty by a reference to these periods.

(4.) The time for the determination of the estate. The time for the determination of the estate.

This must be certain.

4. Terms for years are divided into three kinds:—(1) absolute; (2) upon condition; and (3) with collateral determinations. The division of terms.

A term for years is absolute when it is for a certain and fixed number of years, without any condition or collateral determination, the end being to happen by effluxion of time.

A term for years upon condition may be terminated before it arrive at the period to which the limitation has

extended it; *ex. gra.*, an estate to A for 500 years, provided that if B shall pay to A 1000*l.* on the 1st of next January, the term shall cease. It is obvious, then, that a condition annexed to the estate, to defeat it before the end of the term by the effluxion of time, if the event pointed out by the clause of condition shall arise within the term, the estate is on condition, and not an absolute estate.

A term for years, with collateral determinations, may continue under the limitation, till the time at which the term or space for which it is granted will expire. Collateral determinations may be moulded in any manner according to the agreement of the parties. By these means that may be effected which cannot be accomplished by express and direct limitations, as is evident from the following cases:—a lease by a parson for twenty-one *years* determinable on his *ceasing to be a parson*, and a lease *for so many years as he shall continue parson*; and of a lease for twenty-one years, *if a man shall so long live*, and a lease *for so many years as a man shall live*, without ascertaining the number of these years.⁷⁷

Long terms for years, with provisions for their determination, are resorted to in marriage and other settlements, and especially in mortgage transactions.⁷⁸

Interesse
termini.

5. If a term of years be created by a lease or demise operating at the common law, the lessee, before he actually enters upon the premises, has no estate, but only a right of entry or *interesse termini*, which is an executory interest, and is assignable.

But if the term be created by any assurance which

(77) A grant of a rent for life out of a long term of years, though good for so many years as the term endures, is only a chattel and not a freehold. If a lessee for years grant land to another for term of his life, he has the whole term, if he live so long. For it is repugnant to have a freehold out of a term for years.—7 Co. 25 a.

(78) Leases made by virtue of an appointment will be observed upon in a Tractate devoted to the learning of Powers generally.

takes effect under the Statute of Uses, the estate vests in possession, and becomes perfected without entry, at the period when it is intended to take effect. And terms created by a devise in a will do not require entry to vest them as estates.⁷⁹

6. Where a long term for years had been created for a given purpose, and that purpose had been fully accom-^{The satisfied-term Act.}plished, the term was, of course, fully satisfied. It should, therefore, have been merged by an assignment or surrender to the reversioner, but the practice was to keep such a term on foot, and upon a purchase or mortgage of the land, to make an assignment of such satisfied term to a trustee for the purchaser or mortgagee upon trust to protect him and his estate from all mesne or middle incumbrances, *i.e.*, all estates and charges created intermediately between the completion of the term and the assignment of it, of which the purchaser or mortgagee had no notice at the time of his purchase or mortgage.⁸⁰ This practice afforded a shield to purchasers, and mortgagees, who are purchasers *pro tanto* their loan. But it seemed wise to our law-makers to put an end to the system, for by 8 and 9 Vict., c. 112, every satisfied term which, on the 31st December, 1845, either by express declaration or by construction of law, [more correctly of equity,] was attendant on the inheritance, absolutely ceased; so has every term which has been satisfied since that day, and which either by express declaration or by construction of law, has since that day become attendant on the inheritance; and so will cease every term which shall hereafter be satisfied, and so become attendant on the inheritance. With this only exception, that every term which was so attendant by express declaration on the 31st December,

(79) Co. Litt. 111 a.

(80) Watkins' Conv. p. 45, *et seq.*, and the authorities cited in the margin; also Sug. V. & P. c. xv.

1845, is to afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him had it continued to subsist, but had not been assigned or dealt with after the 31st December, 1845.

Incidents of
this estate.

7. The incidents to this estate are the following :—

(1.) The tenant is entitled to the same estovers as a tenant for life, unless restrained by special agreement.

(2.) He cannot commit waste.

(3.) He is entitled to emblements where the term for years depends upon an uncertainty.

(4.) His estate is subject to all kinds of debts.

(5.) He may by deed assign his whole interest in the estate, or underlease part of it, unless restrained by condition or covenant. A surrender may either be by deed duly executed, or it may arise by operation of law, as the acceptance of another interest incompatible with the first. If the tenant have underleased, he cannot, by surrendering his original lease, destroy the underlease, for it would be positively unjust to frustrate his own grant. But if the original lease be rendered void, by breach of any of its conditions, or an entry be made in consequence of such breach, the underlease will then be defeated; otherwise the original grantee might, by granting an underlease, deprive the original grantor of the benefit of the conditions contained in his grant.

(6.) When the term for years vests in the person who is seised of the freehold, by which there is an union of the two interests in the same person at the same time, and there is no intervening estate between the term and the freehold, the term merges in the freehold and becomes extinct.

(7.) The estate is forfeited by the tenant attempting to create a greater interest than he has.

§ 10 (b). *Tenancy from year to year.*

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| 1. How created. | | 3. In what it differs from terms for years. |
| 2. Of what it consists. | | 4. Its incidents. |

1. This estate arises either expressly, as when one lets How created. property by a general parol demise to another, without any determinate interest, but reserving the payment of an annual rent; or impliedly, as when property is occupied, generally, under a rent payable yearly, half-yearly, or quarterly; or, where an occupier, under an agreement for a lease at a certain rent, pays rent; or, where a tenant holds over, after the expiration of his term, without having entered into any new contract, and paid rent, (for before paying rent only a tenancy on sufferance arises,) in all these cases a tenancy from year to year is implied by operation of law.

A demise by a tenant from year to year to another, also to hold from year to year, is in legal operation a demise from year to year during the continuance of the original demise to the intermediate landlord.⁸¹ When a tenant goes into possession of property under a void lease, a tenancy from year to year is created. If a mortgagee accept a person as his tenant, to whom the mortgagor has granted a lease for years after the mortgage, that makes him only tenant from year to year to the mortgagee.⁸²

2. This tenancy consists, in the first instance, of a cer- Of what it
consists. tain term for one year, which, upon the expiration of the first half-year, unless notice be given by one of the parties to the other of his contrary intention, becomes an equally assured term of two years, reckoning from the commencement of the tenancy; and thus a new year is continually added to the term, as often as the half-year's previous

(81) *Pike v. Eyre*, 4 Man. & Ry. 661.

(82) *Shep. Touch.* 242.

notice which would secure its expiration is omitted to be given. In short, a tenancy from year to year is considered as re-commencing every year.⁸³

In what it
differs from
terms for
years.

3. The distinction taken between a tenant from year to year, and a tenant for a term of years, is rather a distinction in words than in substance, for they both possess the same advantages, the estates partaking of nearly the same attributes.

The qualities that distinguish it from proper terms for years, and from estates at will, are, that it is now raised by construction of law alone, instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an annual rent has been paid, but without there having been any conveyance or agreement conferring a legal interest; and that, whether it arises from express agreement, or by implication of law, it may, unless surrendered or determined by a regular notice to quit, subsist for an indefinite period, if the estate of the lessor will allow of it, or for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of their estate by either of them;⁸⁴ and the assigns, or real or personal representatives, of the former according to the quantity of his estate, and the assignee, or personal representatives, of the latter, still continue the tenancy upon the original terms, and subject to the same conditions which the law, or the express agreement of the parties, has attached to it. But it is liable at any time to be determined by a notice to quit, from either party, which, where there is no agreement, or where the agreement is silent on that point, must be at least *half a year's (and not merely six months')* notice, requiring from the tenant, or

(83) 8 Car. & P. 729.

(84) *Birch v. Wright*, 1 T. R. 380.

offering on his part, to give up possession at the expiration of the year, computing from the time when the tenancy commenced.⁸⁵ And a parol notice is sufficient, unless the agreement requires it to be in writing, (per *Lord Ellenborough*, C. J., in *Doe v. Crick*, 5 Esp. N. P. C., 197); but for the sake of evidence it is always advisable to give a written notice. And where the commencement of the tenancy is not known, and the lessor cannot, from the objection of the tenant to the notice, or any other cause, avail himself of the periods of the payment of the rent as presumptive evidence of the commencement of it, a notice from him requiring the tenant to quit, at the expiration of the current year of the tenancy, which shall expire next after the end of half a year from the date of the notice, will be sufficient.⁸⁶ But it seems advisable in such a case to give the notice on one of the quarter days on which the rent is payable, and not to bring an ejectment before the expiration of a year and a quarter from the date of the notice, in order to be certain that the year of tenancy has expired.

4. The incidents of this estate are these :—

Its incidents.

- (1.) The owner may assign or underlet the property unless expressly restricted.
- (2.) He is entitled to emblements when his estate ends by the happening of an uncertain event over which he has no control.
- (3.) He is liable for injuries arising from voluntary negligence.
- (4.) He is bound to fair and tenantable, but not to substantial and lasting, repairs.

(85) *Right v. Darby*, 1 T. R. 159.

(86) *Doe v. Butler*, 2 Esp. N. P. 589.

§ 11 (c). *Tenancy at Will.*

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| 1. Its description. | | 4. Under what circumstances it now arises. |
| 2. How created. | | 5. When the right to emblements accrues. |
| 3. Construction of it by the Courts of Law. | | 6. How determined. |

Its description.

1. This estate entitles the grantee to the possession of land during the pleasure of both the grantor and himself, yet it creates no sure or durable right, and is bounded by no definite limits as to duration. It must be at the reciprocal will or volition of both parties; (for if it be at the will of the lessor only, it is a lease for life,⁸⁷) and the dissent of either determines it. The grantee cannot transfer the estate to another, although after he has entered into possession, he may accept a release of the inheritance from the grantor, for there exists a privity between them. It must end at the death of either party, for death deprives a person of the natural power of having any will. If a lessee for years accept an estate at will in the property leased, his term of years would, in law, be surrendered.⁸⁸

How created.

2. An estate at will is created either by the stipulation or express agreement of the parties, or by construction of law.

Construction of it by the Courts of Law.

3. For the furtherance of justice, and in order to encourage agriculture, by securing to the farmer the just right of reaping that which he has sown, the Courts of Law will construe an estate at will, created by parol, into a tenancy for a year, or from year to year, provided such a construction would not work a forfeiture,⁸⁹ or be not productive

(87) Per Brudnell, C. J., Mich. 14 Hen. VIII., fol. 14.

(88) 6 Com. Dig. 306.

(89) *Fenny v. Child*, 2 M. & S. 255.

of any wrong or injury, and there be no Act of Parliament which declares such estate shall be an estate at will.

Mr. Preston says (Est. p. 668, 1st edit.) "The Judges have been thought to express themselves of late years, as if there might not be a tenancy at will. However, they are not to be understood as advancing any such indefinite position. All they mean to say, and all that can be inferred from what they have said, when their expressions are referred to the subject-matter, is, that there shall not be a tenancy at will by construction, or, in other words, they declare the law to be, that as often as there is a demise without any limitation of time, it shall be construed a demise for one year, and, afterwards, from year to year at the election of the parties; and as to these tenancies by construction, it is clear, that unless a notice to quit shall be given at the end of the first half year, the tenant may hold for a second year, and so on from year to year, until a notice to quit is given to him for half-a-year before the end of the current year: and the Judges are not to be understood to say that there may not at this day be a demise at will."

The Statute of Frauds, 29 Car. II., c. 3, § 1, enacts that a lease by parol for a longer term than three years, shall have the force and effect of an estate at will only. The courts have decided that such an estate at will shall be a tenancy from year to year. The grounds of this determination appear to be, that the object of the statute was principally to render invalid any parol agreement for a lease for a longer term than three years; and as the constructive tenancy from year to year, arising from the mere possession at an annual rent, was not then established, the statute could only refer to a tenancy at will, when it avoided the actual agreement between the parties: but after the tenancy from year to year was raised by implication of law from the acts of the parties, the courts did not feel that they violated the intention of the statute in giving the

same effect to the possession and payment of rent by a person who entered under a parol lease void by the statute, which they would have done, had the same circumstances occurred unconnected with such parol lease, and they therefore felt themselves bound by the prior decisions to put the same construction upon those circumstances, as evidence to infer an agreement for a tenancy from year to year, notwithstanding the agreement between the parties, which in consequence of the statute could not be taken into consideration. They do not therefore give any effect to a parol lease which the statute has rendered null, but merely presume, consistently with their decisions in other cases, an agreement for a different kind of tenancy, where the facts of the case will warrant that construction. And it should seem that in conformity with these principles they would construe a possession taken under a parol lease void by the statute, as a strict tenancy at will, where no act is done by the lessor, by acceptance of rent, or otherwise, to raise by implication a tenancy from year to year; but where such acts take place that tenancy will be implied.⁹⁰

Under what
circum-
stances it now
arises.

4. Notwithstanding this construction of the courts, estates at will still exist, and arise in the following cases:—

(1.) Where there is an express letting by will.

(2.) Where the raising a tenancy from year to year by implication alone would make a forfeiture, for a mere construction of law cannot be allowed where it will work an injury.

(3.) A mortgagor in possession of the mortgaged property, without any express agreement as to the period of possession, and with the mortgagee's consent, is but a

(90) Watkins on Convey. p. 10.

tenant at will to the mortgagee, but he is not entitled to emblements, for they go in discharge of the loan, and he may be ejected by the mortgagee, without any previous determination of the will.⁹¹

(4.) A beneficiary or *cestui que trust* in possession of the estate, with the consent or acquiescence of the trustee, is constructively a tenant at will to his trustee, in order to preserve as well the interest of the *cestui que trust* as the estate of the trustee.

(5.) An entry upon property by a person under an agreement to purchase or lease it, with consent of the vendor or lessor, raises a tenancy at will between the parties, until the agreement be carried into execution and completed.

(6.) If a person make a feoffment, and deliver the deed without giving livery of seisin, and the feoffee enter, he is constructively a tenant at will.

5. A tenant at will is entitled to emblements, where his estate is determined by the lessor, or by his death; and his personal representatives are entitled to it, where the estate is determined by his own death. But if the lessee forfeit, or determine, the estate himself, he is not then entitled to them. It is to be remarked that a tenant from year to year has not the same advantage, if his tenancy expire before the harvest, as he must yield up possession at the regular expiration of the notice to quit, without any reference to the then state of the crops.

When the right to emblements accrues.

6. We have seen either party may determine this estate. The lessor can do so by an express declaration that the lessee shall hold no longer, which should either be made

How determined.

(91) See 5 Barn. & Ald., 604 & 687.

on the land. or notice of it served upon the lessee. But if he exercise any right of ownership, unless it be with the lessee's consent, inconsistent with the enjoyment of the estate, it will put an end to it, as entering upon the land, cutting down trees demised, making a transfer or lease for years to commence immediately. If the lessee commit an act of desertion or do anything inconsistent with his estate, as assigning it to another person or committing waste; but a verbal declaration that he will hold the lands no longer does not determine his estate, unless he waive, at the same time, the possession. Neither party can determine this estate at a time when it would be beneficial to the other; and six months' notice must be given before bringing an action of ejectment.

If a tenant at will, therefore, rendering rent quarterly determine his will in the middle of a quarter, he must pay a quarter's rent; on the other hand if the lessor determine the will in the middle of a quarter, he must lose a quarter's rent.

If the lessor determine this estate, the lessee shall have reasonable ingress and egress to take away his goods and chattels. This is simply common justice.⁹²

(92) Littleton, § 69, remarks, "Also if a house be letten to one to hold at will, by force whereof the lessee entreteth into the house and brings his household stuff into the same, and after the lessor puts him out, yet he shall have free entrie, egress, and regresse into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mere estate in fee-simple, fee-taile, or for life, hath certaine goods within the said house, and makes his executors and dieth; whosoever after his decease hath this house, his executors shall have free entry, egress, and regresse to carrie out of the same house the goods of their testator by reasonable time."

§ 12 (d). *Estate by Elegit.*

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| 1. Its description.
2. Whence derived.
3. The sheriff's duty under the writ. | | 4. How the execution-creditor gets possession, and the debtor ultimately returns to the enjoyment of his property. |
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1. This estate owes its existence to the Statute-Law, and is a security or *vivum vadium* for the payment of a judgment-debt. It is a chattel-interest, and passes to the executor, although its possessor, the judgment-creditor, is said to hold the land as an estate of freehold, defeasible upon a condition subsequent, for such an interest has only the similitude and not the nature of a freehold; the tenancy does not commence until a valuation of the property has been made by the sheriff, it possesses then all the certainty of continuance which is necessary to constitute a term of years.

2. The *elegit* is a writ of execution given by the Statute of Westminster the Second (13 Edw. I., st. 1, c. 18)⁹³ when a debt is recovered or acknowledged in the courts at Westminster, or damages awarded, at the option of the creditor, instead of the ordinary process of *feri facias*. This writ is so called because the judgment-creditor elects to take his remedy on his debtor's lands. The writ extends the whole of the debtor's lands,⁹⁴ instead of a moiety, as was the case.

3. Upon the receipt of the *elegit*, the sheriff must impanel a jury, who are to enquire of all the goods and chattels of the debtor, and appraise the same, and also to enquire as to his lands and tenements, and their value; upon such inquisition had, the sheriff is to deliver to the

(93) A. D. 1286.

(94) 1 & 2 Vict., c. 110, § 11

execution creditor all the goods and chattels of the debtor, (except his oxen and beasts of the plough) at the value set upon them by the jury; and if the goods be sufficient to satisfy the debt, the lands cannot be extended. If, however, the goods be insufficient, the sheriff is to proceed to make and deliver execution to the execution creditor, of all the lands, &c., of the debtor, and must return the writ, in order that the inquisition may be recorded in the court out of which the *elegit* issued.

How the execution creditor gets possession and the debtor ultimately returns to the enjoyment of his property.

4. The sheriff delivers only legal possession of the lands, or rather a right of entry, and not actual possession; if, therefore, the execution creditor cannot enter without force, he should proceed by ejectment. As soon as the execution-creditor shall have fully satisfied his judgment out of the extended value of the land, the debtor may recover his land, either by ejectment, *scire facias ad rehabendam terram*, bill in equity, or reference to one of the Masters of the court to ascertain the amount of the rents and profits received, and order that, if it appear that the debt, damages, and costs are satisfied, possession shall be delivered to him.

§ 13 (e). Tenancy on Sufferance.

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| 1. Its description. | 4. How determined. |
| 2. How created. | 5. Penalties for over-holding. |
| 3. As to the Crown. | |

Its description.

1. This is the least and lowest estate which can subsist in realty. It is in strictness not an estate, but a mere possession only. It arises when a person after his right to the occupation, under a lawful title, is at an end, continues (having no title at all) in possession of the land, without the agreement or disagreement of the person in

whom the right of possession resides.⁹⁵ Thus if A is tenant for years, and his term expires, or is tenant at will, and his lessor dies, and he continues the possession, without the disagreement of the person who is intitled to the same, in the one and the other of these cases, he is said to have the possession by sufferance,—that is, merely by permission, without any right; the law esteeming it just and reasonable, and for the interest of the tenant, and also of the person intitled to the possession, to deem the occupation to be continued by the permission of the person who has the right, till it is proved that the tenant withholds the possession wrongfully, which the law will not presume. As the party came to the possession by right, the law will esteem that right to continue either in point of estate, or by the permission of the owner of the land, till it is proved that the possession is held in opposition to the will of that person.

An undertenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is a *quasi* tenant at sufferance.⁹⁶

2. This tenancy is created only by construction of law, How created. and cannot originate in the agreement of the parties. For the agreement of the parties would pass either an estate at will, or from year to year, according to the interest of the parties. There exists no privity⁹⁷ between the tenant at sufferance (who has but a mere possession, without privity) and the person entitled to the possession; yet such occupancy is not adverse to the title of the person who possesses the

(95) Lord Coke tells us (in 2d Inst. 134) this diversity is to be observed, that where a man cometh to a particular estate *by the act of the party*, there if he hold over, he is a tenant at sufferance; but where he cometh to the particular estate *by act of law*, as a guardian for instance, there, if he hold over, he is no tenant at sufferance, but an abator. The same doctrine is laid down in 1 Inst. 271.

(96) 4 Tyr. 781.

(97) Co. Litt. 270 b.

right of entry ; unless he choose to consider it so ; but an adverse possession will take place on an entry and perception of the profits of the land by a person, without the reversioner's consent, after the death of a tenant at sufferance.⁹⁸ This estate cannot be the subject of conveyance or transfer.

As to the
Crown.

3. Since *laches* or neglect can never be imputed to the Sovereign, a lessee of crown lands, holding them over after the determination of his interest in them, is never considered a tenant by sufferance, but he is deemed a bailiff of his own wrong and so accountable to the Crown, but after office found, he becomes an absolute intruder.⁹⁹

How deter-
mined.

4. This estate is put an end to whenever the true owner actually enters upon the lands, by which he declares the continuance of the tenant tortious and wrongful, or demands possession, or brings his action of ejectment¹⁰⁰ to recover possession, which he may do without any previous demand. Prior to entry, an action of trespass cannot be maintained against the tenant, for his sufferance must be previously determined by entry, before this possessory action will lie.

Penalties for
over-holding.

5. *Formerly* a tenant at sufferance was not liable to pay any rent for the lands, because it was the folly of the owner to suffer him to continue in possession after the determination of his rightful estate: *now*, by 11 Geo. II., c. 19, § 18, it is enacted, that in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises, and shall not accordingly deliver up the

(98) See Watkins' Conv., 23—27.

(99) Finch's case, 2 Leon. 143.

(100) The action of ejectment will form the subject of a Tractate. See 1 & 2 Viet., c. 74.

possession thereof at the time in such notice contained, the said tenant or tenants, his, her, or their executors or administrators, shall, from thenceforward, pay to the landlord *double the rent or sum* which he, she, or they should otherwise have paid. A tenant who has given notice, and paid double rent, may quit without fresh notice. The acceptance of single rent, which has accrued due subsequently to the notice, is, it seems, a waiver of the landlord's right to double rent, although it does not necessarily imply that the tenancy should continue. The double rent is recoverable either by distress or action at law.

By 4 Geo. II., c. 28, § 1, it is enacted, that if any tenant or tenants for life, or tenants for years, or persons coming in under or in collusion with them, hold over any lands, tenements or hereditaments, after the determination of their estates, after demand made, and notice *in writing* given, for delivering the possession thereof, by the landlord, or the person having the reversion or remainder therein, or his agent thereunto lawfully authorized, such tenant or tenants so holding over, shall pay to the person so kept out of possession, at the rate of *double the yearly value* of the lands, tenements, and hereditaments so detained, for so long a time as the same are detained ; to be recovered by action of debt, against which recovery there shall be no relief in equity.

CHAPTER II.

THE QUALITY OF ESTATES.

1. Quality distinguished from Quantity.
2. THE TIME OF ENJOYMENT.—Three modes of distributing the subject.

Quality distinguished from quantity.

1. We devoted the first chapter to the elucidation of the extent or continuance of time of the several species of estates, *i. e.*, their several quantities: the present chapter will be taken up with the quality of estates, by which expression is meant the period when, and the manner in which, the right of enjoying an estate is to be exercised.

In speaking of the quantity of estates, we have detailed many of their qualities, which afford the measure of their extent, especially when we expounded the learning of qualified and determinable fees, and of estates with collateral determinations. The qualities, then, which we now propose to present to the reader's attention are of two kinds:—(1.) The period when the right of enjoying his estate is conferred upon the owner, whether at present or in future; and (2.) The manner in which the owner's right to the enjoyment of his estate is to be exercised, whether solely, jointly, in common, or in coparcenary.

The time of enjoyment—
Three modes of distributing the subject.

2. And first let us observe upon the period when the right of enjoying his estate is conferred upon the owner; in other words, THE TIME OF ENJOYMENT.

This subject has been thus divided:¹⁰¹—

1. In possession.

2. In expectancy. $\left\{ \begin{array}{l} 1. \text{ Remainder} \\ \text{(created by} \\ \text{act of par-} \\ \text{ties.)} \end{array} \right\} \begin{array}{l} 1. \text{ Vested or executed.} \\ 2. \text{ Contingent or executory.} \end{array}$

2. Reversion (created by act of law.)

(101) Mr. Preston has a very elaborate and intricate division (1 Estates p. 22). It is as follows:—

Estates, with respect to their qualities, so far as the quality of an estate has any relation to the time of enjoyment, and also with respect to the manner of enjoyment during that time, may be arranged,

As to their general qualities—into estates,

1. Of freehold,
2. Not of freehold.

As to their extent—into estates,

1. General,
2. Qualified,
3. Particular.

As to the circumstances under which they are to confer, on the one hand, a present right of present or future enjoyment; and on the other hand, a future right of future enjoyment—into estates,

1. Executed,
2. Executory.

As to the *certainty* of their giving a present or future right of enjoyment—into estates,

1. Vested,
2. Contingent.

As to the time at which they are to confer the right of enjoyment, either at present or in future—into estates,

1. In possession,
2. In remainder,
3. In reversion.

And estates of this description, in regard to the relative situation they bear to each other, are said to be,

1. $\left\{ \begin{array}{l} \text{Preceding,} \\ \text{Expectant, or depending.} \end{array} \right.$
2. $\left\{ \begin{array}{l} \text{Mediate,} \\ \text{Immediate.} \end{array} \right.$
3. $\left\{ \begin{array}{l} \text{Original, or } \textit{primitive}, \\ \text{Not original, or } \textit{derivative}. \end{array} \right.$

As to the manner in which the right to that enjoyment is to be exercised :

I. In regard to the certainty of continuance—into estates,

1. Absolute,
2. Determinable,
3. Conditional.

Mr. Fearne, however, commences his celebrated essay on the learning of contingent remainders and executory devises, with the following analysis :—

When we consider estates with regard to the certainty and the time of the enjoyment of them, we may distinguish them into

Estates	{	vested 102	{	in possession ; a right of <i>present</i> enjoyment actually existing.	{	reversions, vested remainders, such executory devises, future uses, conditional limitations, and other future interests as are <i>not</i> referred to, or made to depend on, a period or event that is uncertain.
				in interest — there being a present fixed right of <i>future</i> enjoyment ; as—		
				contingent — a right of enjoyment being to accrue on a dubious and uncertain event ; as		contingent remainders, and such executory devises, future uses, conditional limitations, and other future interests as are referred to, or made to depend on, an event that is uncertain.

II. In regard to the mode of tenancy :

1. By one person separately, *viz.* in sole tenancy,
2. By several persons together, and at the same time.

And estates, with respect to the connection of the tenants, as giving the right to several persons together, and at the same time, are said to be held,

1. By entireties,
2. In joint-tenancy,
3. In coparcenary,
4. In common.

And lastly, as to the mode in which the estates are created, limited, or transferred—into estates,

1. By limitation of the legal estate,
2. By limitation of use,
3. By resulting use,
4. By limitation of trust,
5. By *implication* of law.

Such is the nature and such is the division of estates.

(102) An estate is said to be *vested*, when there is an immediate fixed right of present or future enjoyment.

We will try to elucidate this great and abstruse subject under the heads of possession, reversions, remainders, and executory devises, in the four following sections.

§ 1. *Possession.*

1. Explained.

1. An estate in possession is frequently denominated an Explained. estate executed, *i. e.*, completely and absolutely held by its owner, who, therefore, actually enjoys a present right of present enjoyment. This interest is so plain and obvious that it demands no further description in this place; but, when we treat of the important subject of title, which we purpose doing, the disturbance of an owner's possession will demand our particular regard.

§ 2. *Reversions.*

1. Explained.

2. How a reversion arises.

3. Its incidents.

4. A particular estate essential.

5. When it is liable to curtesy and dower.

6. The 6 Anne, c. 18.

1. A reversion is that portion left of an estate after a Explained. grant of a particular portion of it, short of the whole estate, has been made by the owner to another person. It is thus described by Mr. Watkins.¹⁰³ When a person has an interest in lands, and grants *a portion of that interest*, or, in other terms, *a less estate than he has in himself*, the possession of those lands shall, on the determination of the granted interest or estate, *return or revert to the grantor*. This interest is what is called the grantor's reversion, or, more properly, his right of reverter, which, however, is deemed an actual estate in the land, bearing the fruits of seignory. Thus, a grant of an estate by the

owner of its fee-simple "to A. for life," leaves in the grantor the reversion in fee-simple, which will commence in possession after the determination of his life-freehold ; and this is called the particular estate ; particular as carved or sliced out of the larger estate or reversion.

How a reversion arises.

2. This right of reverter arises by the operation of law : it cannot be created by the act of the parties. A reversion, being an immediate interest, may be granted over to another person : it may be charged, and is also devisable.¹⁰⁴

Its incidents.

3. The usual incidents to every reversion are fealty and rent, because the grantee of the particular estate holds as tenant of the reversioner.

When rent is not reserved on the particular estate, fealty, however, results of course, as an incident quite inseparable ; and when rent is reserved, it is also an incident, though not inseparably so, to the reversion. The rent may be granted to another, and the reversion retained, and the reversion may be granted to another, specially reserving the rent ; but by a general grant of the reversion the rent will pass by it as incident thereto, though by a grant of the rent generally the reversion will not pass. The incident (which is a thing appertaining to or following another, as more worthy or principal) passes by the grant of the principal, but not *è converso* ; for the maxim of law is *accessorium non ducit, sed sequitur, suum principale*.

A particular estate essential.

4. As the creation of a particular estate is absolutely essential to give existence to a reversion, so the continuance of the reversion depends upon the continuance of the

(104) Although a person can only be said to be entitled to, not seised of, a reversion, yet reversions are vested interests, which may be aliened and charged much in the same manner as estates in possession.—Wiscot's case, 2 Rep. 61.

particular estate; for if, by any means, as by forfeiture, surrender, or regular expiration, such particular estate determine, the interest of the grantor must necessarily cease to be an estate in reversion, and will become an estate in possession, into which he may immediately enter.

5. A man will not be entitled to tenancy by the curtesy of, nor a woman to a dower out of, a reversion or remainder *expectant upon an estate of freehold*; but upon a reversion expectant upon an estate for years, both these rights (of dower and of curtesy) accrue; (*Stoughton v. Leigh*, 1 Taunt. 410;) for the possession of the tenant for years constitutes a legal seisin of the freehold in reversion. (*De Gray v. Richardson*, 3 Atk. 470; *Goodtitle v. Newman*, 3 Wils. 521).

When it is liable to curtesy and dower.

6. In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann. c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the Court of Chancery and order made thereupon,) once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.¹⁰⁵

The 6 Anne, c. 18.

(105) Mr. Preston, in his work on Abstracts, Vol. II., p. 83, observes upon reversions as follows:—"This is the estate retained by a grantor of a particular estate, or by the settler, who, after limiting several particular estates by way of use, limits the ultimate fee to himself, or the same results to him by the operation of law.

In a common-law gift, if he limit the fee in contingency, he will have the possibility of reversion. Fearné doubts this conclusion.

So if the testator create several particular estates, and the ultimate fee is limited to or to the use of his right heirs, this is a reversion, and descends to the heir. The authorities are collected in Gwillim's Bacon, ch. Remainder.

§ 3. *Remainders.*

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|---|---|
| 1. Explained. | does not render a remainder contingent. |
| 2. Wherein they differ from reversions. | |
| 3. Their three kinds. | 10. The 8 & 9 Vict., c. 106, § 8, as to trustees to preserve contingent remainders. |
| 4. Seven rules affecting remainders. | |
| 5. Conditional limitations distinguished. | 11. What interposed remainders prevent ultimate remainders from vesting. |
| 6. Vested remainder defined. | |
| 7. Contingent remainder defined. | 12. Contingency with a double aspect. |
| 8. Their four sorts. | 13. Cross-remainders. |
| 9. Uncertainty of vesting in possession | |

Explained.

1. A remainder is that portion of interest which, on the creation of a particular estate, is limited over to another.

It may be limited in inheritable or non-inheritable freehold estates, but not strictly and technically, in chattels real or personal, although these may be limited over after a previous limitation of a partial interest in them.

But a devise to trustees in trust for the heir or heirs at law of B., and the heirs, executors, &c., of such heir or heirs, though the heir at law answer the description, is not the old reversion, but a new gift, making the heir a purchaser. But if the use of the fee be limited in contingency, the fee will result to the grantor till it can vest; and if the fee be devised in contingency, that fee will descend to the heir at law, unless it be disposed of, as it may be by some residuary clause, or by some special disposition.

The ultimate interest taken under a conveyance to uses is not, strictly speaking, a reversion according to the rules of the common law. It is an interest in the nature, and partaking of all the qualities of a reversion. Whether this reversion remain in the lessor or settler, or the heir at law of a testator; or is aliened by the owner, either for the entire estate, or for a portion of it; or whether it be a residue of a particular estate; it retains its denomination of a reversion; so that there may be a reversion for years for life, or in fee; and the estate, which is a reversion as to one person, may be a particular estate as to another person: for example: A. leases to B. for life, and grants the reversion to C. for years; as between B. and C., C. has a reversion; but as between A. and C., C. has a particular estate.

An estate in reversion may lose its denomination and peculiar qualities by becoming an estate in possession; and it may become an estate in possession by the surrender, merger, forfeiture, or actual determination of the prior estate.

The material circumstance to be regarded as to estates in reversion, is, that they cannot be granted or surrendered by mere writing.—Sheppard's Touch. chap. Surrender.

But there may be a surrender of an estate in reversion by mere implication of law, as by accepting another estate incompatible with the estate surrendered.

It follows from the observations which have been made, that an estate in reversion may pass by mere grant. The contrary is supposed to have been asserted by Mr.

In the same land there may at the same time be an estate in *possession*, and one estate or several estates in *remainder*, and an estate in reversion.

When the estate in possession is determined, the estate in remainder, if there be any, otherwise the estate in reversion, will become an estate in possession, with priority as to the estates in remainder, when there are several, according to the order in which they are limited.

An interest in possession, and an interest in remainder or reversion, are several parts of the same estate. When there are a particular estate and a remainder, the several limitations give distinct interests to the persons to whom these limitations are made.

These interests (different as they are in their nature) and also a reversion, are, with reference to the person by whom the limitations are made, and the connection and relative situation of the tenants, several parts of the same estate.

Estates are said to be in remainder or reversion, according to the relative situation they bear to each other.

The interest which, as to one man, is an estate in remainder, may, as to another person, be an estate in reversion. Thus A. leases to B. for life, with remainder to C. in fee, and C. leases to D. for life; the estate of C. is still a remainder in reference to the estate of B. In reference to the estate of D. it is a reversion.

So an estate which, as to one person, is an estate in

Fearne, in his Reading on the Statute of Enrolments; but it is difficult to account for that great lawyer's having fallen into this mistake, if made by him.

Though a grant would be an effectual mode of assurance to pass an estate in reversion, a lease and release, and bargain and sale enrolled, are more generally used in practice; and they are entitled to preference, from the circumstance that they are in themselves complete evidence of title, while a mere grant, at least without a recital of the existence of the prior estate, must be supported by extraneous evidence, to show that a prior estate existed; so that there was a reversion divided from the possession. This distinction is now abolished, since a grant passes estates in possession as well as in expectancy.

possession or a particular estate, may, as to another person, be an estate in reversion; and consequently there may be two reversions in the same land. As if A. lease to B. for life, B. has the possession, and A. the reversion, as between themselves; and if B. lease to C., then, as between B. and C., C. has the possession, and B. a reversion: hence the doctrine of privity of estate.

Wherein they
differ from
reversions.

2. A remainder does not, like a reversion, arise by operation of law, but is always created by act of parties. It may be granted over, charged, devised, or barred by a prior tenant in tail. Mr. Burton (Comp. p. 8) thus indicates the difference between a reversion and a remainder.

If the gift were simply "to you for your life," the reversion in fee-simple would remain in the feoffor. But this consequence would be varied, if the gift were, "to you for your life, and after your decease to A. and his heirs;" or "to you for twenty-one years, and, subject to that estate, to A. and his heirs;" or, "to you and the heirs of your body," (which would constitute an estate tail,) "and upon your decease, and failure of your issue, to A. and his heirs." In any of these three cases, A. would take an estate in fee-simple, giving him a right to the possession of the land upon the death of the feoffee, or the expiration of twenty-one years, or the extinction of the feoffee and his issue. But this estate is not called a *reversion*, as the land does not revert or return to the feoffor, but a *remainder*, being the residue or remnant of the whole estate conveyed, after subtracting the feoffee's estate; which last, in relation to the remainder, as in this, or to the reversion, as in the former case, is called the *particular estate*.¹⁰⁶

(106) The distinction between a reversion and a remainder is not merely nominal. All land, by the feudal system, is subject to some lord, to whom services (whether valuable or not) are due from the owner; and no alienation by him can deprive the lord of this

The rule against perpetuities does not apply to remainders:—1st, because every remainder which is contingent must vest in interest during the continuance of the particular estate or the very instant it determines; and, 2ndly, because the owner of every vested remainder, being an estate of inheritance, and which must be an estate tail if there are remainders over, has the power, when in possession, of barring all subsequent remainders.

3. Remainders are of three kinds:—(1), vested or executed; (2), contingent or executory; and (3), cross. Their three kinds.

4. The seven following rules affecting remainders should be observed:— Seven rules affecting remainders.

(1.) There must be a present or particular estate created, which, if the remainder be vested, must be, at least, for years, but an *interesse termini* would be sufficient; or, if the remainder be contingent, it must be an estate of freehold, for if such a remainder have not, it must be supported by a particular estate which is not of freehold, *i. e.*, by a chattel interest; and then while the contingency is in suspense, there must be an ulterior estate of freehold vested in some person, as otherwise there would be no vested freehold at all, which the law will not allow.¹⁰⁷

(2.) The particular estate, and the remainders must be created by the same deed or instrument, but a will and

inherent right, which is called his seignory: but if the owner create a particular estate, and retain the reversion in himself, he becomes himself also a lord of his own donee; for the donee is said to hold the land of him; and this secondary sort of seignory is inseparable from the reversion. On the other hand, if the owner make an alienation at once of the whole fee-simple, he divests himself entirely of every feudal relation; and the feoffee, though he have only a particular estate, holds immediately of the lord, and not of him to whom the remainder is given. The word *reversion*, it may be observed, is sometimes used, though less properly, to signify such a right of future possession as does not in the meanwhile amount to an *estate*.—Plovd. 196, b.

(107) There is not, however, any necessity for a preceding freehold to support a contingent remainder for years; for such a remainder not amounting to a freehold, no freehold estate appears requisite to pass out of the grantor in order to give effect to a chattel remainder.

codicil may be fairly denominated the same instrument, for they take effect at the same time; and a deed giving a power, and the appointment exercising such power, are esteemed the same deed.

(3.) The remainder must vest in the grantee during the particular estate, or the very instant it determines. But an estate limited on a contingency may fail as to one part, and take effect as to another, wherever the preceding estate is in several persons in common or in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it. Posthumous children are capable of taking in remainder in the same manner as if they had been born in their father's lifetime, and the remainder vests in them, while yet *in ventre matris*. 10 & 11 Wm. III., c. 16.

(4.) A contingent remainder must be limited upon a legal event to some one that may by common possibility be in being, at or before the determination of the particular estate.

(5.) It is not necessary for the support of a contingent remainder that the preceding estate of freehold continue in the actual seisin of the rightful tenant; it is sufficient that there subsists a right to such preceding estate at the time the remainder should vest, provided such right be a present subsisting right of entry preceding the contingency, and not a right of action. It is necessary to distinguish between a right of entry and a right of action. If A. is disseised by B., then, while the possession continues in B., it is a mere possession unsupported by any presumption of right; and A. may restore his possession by an entry on the land, without any previous action. If A. enter and B. defend his possession, and the question is tried on a possessory action, the gist of it must be, who has the best title to the possession, and A. must necessarily recover. Thus far the party disseised, even during the disseisin, is considered in law to be the rightful te-

nant. But, if B. continues in the possession of the estate till his decease, the law, at his decease, casts the possession upon his heir: thus, upon B.'s decease, his heir acquires the possession by act of law: and his title, though immediately derived from a person who himself acquired it by wrong, is so far respected in law, that A. cannot restore his possession by entry, and can only recover it by action. This removes A.'s title one degree farther than while he could restore his possession by entry, and is therefore said to reduce him to a right of action, and it is called a right of action in contradistinction from a right of entry.

(6.) Where a contingent remainder is limited to the use of several, who do not all become capable at the same time, notwithstanding it vests in the person first becoming capable, yet it shall divest as to the proportions of the persons afterwards becoming capable, before the determination of the particular estate.

(7.) If a condition be annexed to a particular estate, making it void on a given event; and a remainder be limited to take effect, not only on the determination of the particular estate, but on the destruction of that estate, by the effect of the condition, the remainder is void; the common law rule being that a stranger shall not take advantage of a condition, but only the grantor or his heirs. But if the condition for defeating the prior estate be to operate on one event, and the remainder be to arise on another and totally different event, the remainder will not be void, but the particular estate will be discharged from the condition. If A. make a feoffment to B., a widow, for life, provided that if she marry again, then her estate to cease, and immediately after her death *or second marriage* the estate to enure to B. in fee, *this* is a bad remainder; because it is limited to take effect, not only on the determination of the widow's estate, but also on the

event which is mentioned in the condition to cut that estate short,—namely, her second marriage; but if the remainder had been introduced without the words in italics, then it would have been a good contingent remainder, and the condition would be viewed as surplusage.¹⁰⁸ So, if the limitation had been to the widow *durante viduitate*, the remainder would have been good; as then her death or second marriage would have been the natural period for the determination of her estate. But if the remainder had been introduced by the words, “from and immediately after the determination of that estate,” it would be liable to objection, on the ground that the remainder-man would be taking advantage of the condition, unless the word “determination” could be construed to refer to the death only of the widow, and not to her second marriage.

Conditional
limitations
distinguish-
ed.

5. But such a remainder is supported, as a conditional limitation in wills and conveyances, under the Statute of Uses.

A remainder is to commence when the particular estate is, from its very nature, to determine; it is, as it were, a continuance of the same estate; it is a part of the same whole. A conditional limitation is not a continuance of the estate first limited, but is entirely a different and separate estate. It is not to commence on the determination of the first, but the first is to determine when the latter commences. It is the commencement of the latter which rescinds and destroys the former; and not the ceasing of the former which gives existence to the last. The particular estate and remainders are, in fact, as the very terms imply, but one and the same estate. The estate first appointed, and the conditional limitations, are separate and distinct estates.

6. A vested or executed remainder is that which is limited or transmitted to a person who is capable of receiving the possession, should the particular estate happen to determine; as a limitation to A. for life, remainder to B. and his heirs: here, as B. is in existence, he is capable, or his heirs, if he die, of taking the possession whenever A's death may occur.

Vested remainder defined.

7. A contingent or executory remainder is one limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate.¹⁰⁹

Contingent remainder defined.

8. Four sorts of contingent remainders are distinguished under this definition, by Mr. Fearne, viz. :—

Their four sorts.

(1.) When the remainder depends entirely on a contingent determination of the preceding estate itself; as, if A. convey by grant to the use of B., till C. do such a thing, and after such a thing done by the said C., to the use of D. in fee. The contingency must be such as makes it uncertain, not only whether the event, on which the remainder depends for becoming vested, determines the preceding estate, but whether that event will ever happen. If, therefore, the particular estate is to determine by death, such a contingency is excluded from this class, because death is an event which must certainly happen, at some time or other.

The distinction between contingent remainders and conditional or contingent limitations should be kept in view. Now it is essential to an estate in remainder, that it should wait the regular expiration of the particular estate, and should not take effect in possession till that expiration; but a conditional limitation takes effect on the happening

of an event during the continuance of the particular estate.

Let us illustrate this :—A limitation to A. for his life if he shall so long continue single, and then to B. in fee ; B.'s limitation is a remainder, for whether A.'s life estate expire by his death or marriage, the estate is considered in law to expire equally at the period fixed for its term by the original limitation, since the determining event—marriage—is considered to be incorporated into, and to make a part of, the original limitation, and to form, with it, the original measure.

But if the limitation be to A. for life, with a proviso that if he married, his life estate should cease, the case would be different, the event for the cesser of his estate being extrinsic, separate, distinct, and collateral to the original limitation, and, therefore, making no part of it. The limitation over will then be a conditional limitation.

Butler observes :—Perhaps the difference is artificial, and such as common sense alone would not teach ; but, in legal construction, and in several legal consequences of great importance to the interests of the parties claiming under such limitations, the distinction is established.

(2.) Where the contingency, on which the remainder is to take effect, is independent of, and unconnected with, the determination of the preceding estate ; as, if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life ; here the event of B.'s dying before A. does not in the least affect the determination of the particular estate, nevertheless it must precede and give effect to C.'s remainder ; but such event is dubious, it may or may not happen, and the remainder depending on it is, therefore, contingent.

(3.) Where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination

of the particular estate; as if a lease be granted to A. B. for life, and after the death of C. D., the lands to remain to another in fee. It is certain that C. D. must die some time or other, but his death may not happen till after the determination of the particular estate by the death of A. B., and, therefore, such remainder is contingent.

The following is an exception to this third class of remainders:—

A limitation to A. for eighty years, if B. so long live, with remainder over, after the death of B., to C. in fee. In such a case as this it has been held, that, notwithstanding the remainder over is limited to take effect on an event (B.'s death) which possibly may not happen till after the expiration of the preceding estate for eighty years, yet as the chance against such event's happening before the expiration of the preceding term is exceedingly small, such remainder shall be considered as vested; and that the mere possibility that a life in being may endure for eighty years to come, does not amount to a degree of uncertainty sufficient to constitute a contingent remainder.

(4.) Where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made; as, if a lease be granted to A. for life, remainder to the right heirs of B. Now, there can be no such person as the right heir of B., until B.'s death, (since *nemo est hæres viventis*,) which may not happen till after the determination of the particular estate by the death of A., the tenant for life; therefore such remainder is contingent. So, if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, for it is uncertain who will be the survivor.

A remainder¹¹⁰ over may be so limited as to depend for its vesting on the happening of every kind of event, con-

(110) Butler's note (g) to Fearn, p. 9.

stituting the four sorts of remainders mentioned by Mr. Fearne:—

As a limitation to A. until B. return from Rome, and after the return of B. and C. from Rome and the death of D., to the son of A. in tail-male, who shall first or alone attain the age of twenty-one years. In this case, the remainder to the son of A., so far as it depends on B.'s return from Rome, partakes of the nature of the first sort of contingent remainders; so far as it depends on C.'s return from Rome, partakes of the nature of the second class of contingent remainders; so far as it depends on the decease of D., partakes of the third class of contingent remainders; and so far as it depends on A.'s having a son who first or alone shall attain the age of twenty-one years, partakes of the nature of the fourth class of contingent remainders.

To this class of remainders the rule in Shelley's case, which we have already treated of, presents an exception; exceptions to it occur also where a limitation in a devise to the heir special of a person living, has been adjudged a *descriptio personæ*, or sufficient designation of the person, for the remainder to vest, notwithstanding the general rule that *nemo est hæres viventis*. But the testator's intention, that the estate should vest, must be manifested in the will.

As where A. devised land to I. S. and his heirs, during the life only of B., upon trust to permit and suffer B. during his life to receive the profits, he committing no waste, and after the decease of B. then to the heirs male of the body of B. *now living*, and to such other heirs male or female as he thereafter should happen to have of his body. B. had issue C., a son, then living. It was decided that B. took a trust estate for life, and that the remainder in tail vested in C. immediately, and was not contingent,

for that the words "now living" made the limitation a sufficient designation of the person.¹¹¹

Again, where there was a devise to trustees for the term of twenty-one years for the payment of debts and legacies, remainder to testator's first son in tail male, remainder to the heirs male of the testator's body, and for default of such issue to I. S. for ninety nine years, if he should so long live, remainder to his first and other sons successively in tail male, remainder to the heirs male of the body of the testator's aunt, E. L., lawfully *begotten*, and for default of such issue, the reversion and remainder to the testator's right heirs. The testator gave a legacy to his said aunt, E. L., thereby taking notice that she was then living; he also took notice of her having three sons, to whom he gave a legacy; he also gave his heir at law an annuity out of the lands, and legacies to her children. The testator died childless, and so did I. S.; the question then was, whether the eldest son of E. L. (the said E. L. being living at the testator's death) or the testator's heir at law, was entitled to the land? It was held that though in the strictest legal sense of the word heir, the eldest son of E. L. would not be heir male of her body during her life; yet the word heir had another more general sense, in which it was used for heir apparent, in which sense it was applicable to him at the time of the testator's decease, and that he took the land; for the word "*begotten*" is tantamount to the phrase "*then living*."¹¹²

Another class of exceptional cases arises thus:—Suppose A. die leaving issue two sons, the elder of whom has issue, an only daughter, and dies in his brother's life-time; it is obvious that, under a limitation to A. and the heirs male of his body, A.'s younger son would be entitled *per formam doni*. But A.'s grand-daughter is A.'s general

(111) *Burchett v. Verdant*, 2 Ventr. 311; Fearne's Cont. Rem. 219.

(112) *Darbishon, d. Long, v. Beaumont*, 1 P. Wms. 223; Fearne's Cont. Rem., 210

heir, and the point is whether, in the case proposed, A.'s younger son be sufficiently the heir-male of his body to take under the devise, or, whether, to entitle himself to take under it, he should unite in him the double character of heir-general and heir-male of A. It has been adjudged that he need not.¹¹³

Uncertainty of vesting in possession does not render a remainder contingent.

9. It is to be particularly borne in mind, that it is not the uncertainty of ever taking effect in possession that makes a remainder contingent. Upon this point we cannot do better than quote Fearne, whose mastery of this difficult subject was pre-eminent.

He says, (Cont. Rem. p. 215) "wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse* and ascertained; in that case, notwithstanding the nature and duration of the estate limited in the remainder may be such, as that it may not endure beyond the particular estate, and may therefore never take effect or vest in possession, yet is it not a contingent but a vested remainder. As if a lease be to A. for life, remainder to B. for life or in tail; here, notwithstanding B. may possibly die, or die without issue in the life-time of A., and consequently never come into possession, yet is his remainder vested in interest, and by no means comprised in the legal notion of a contingent estate.

In short, upon a careful attention to this subject, we shall find, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder; such remainder is vested. On the contrary, wherever the preceding estate (except in the

(113) *Goodtitle d. Weston v. Burtenshaw*, Fearne's Cont. Rem., App. I.

instances before noticed, as exceptions to the descriptions of a contingent remainder) is limited, so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not *in esse* or not ascertained; or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect; then the remainder is contingent.

The common limitation to trustees to preserve contingent remainders is a vested remainder. In cases of this description, the estate is conveyed to the use of A. for life; and after the determination of that estate by forfeiture or otherwise, in his lifetime, to the use of B. and his heirs during the life of A., in trust for A., and to preserve the contingent remainders; and, after the decease of A., to the use of the first and other sons of A. successively in tail male. Here the preceding estate may determine by one of two modes, A.'s forfeiture of his life estate, or A.'s decease; the estate of the trustees is to take effect in the first event, and is not to take effect in the second. The remainder to the trustees may therefore appear to be of that sort which is contingent, from its depending on the preceding estate's determining in a particular manner.

The judges held¹¹⁴ that, in every case, where an estate is given to A. for life, the grantor has an interest remaining in him to enter upon the estate, if it should determine by any act of the tenant amounting to a forfeiture; that this right is inherent in the grantor, from the nature of the estate itself, and may be conveyed to the trustees; and that, when it is conveyed to them, it becomes a legal estate in remainder, and vests in them as such. On this

(114) *Smith, d. Dormer, v. Parkhurst*, 18 Vin. 413; 4 Bro. Cas. Par. 353.

ground, the usual limitation to trustees for preserving contingent remainders is held to confer on them a vested estate.

The 8 & 9
Vict., c. 105,
§ 8, as to
trustees to
preserve con-
tingent re-
mainders.

10. The interposition of trustees to preserve contingent remainders has been rendered unnecessary in three cases by the 8 & 9 Vict., c. 105, § 8, which enacts "that a contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and, if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold in the same manner, in all respects, as if such determination had not happened."

Contingent remainders are not preserved by this statute in all possible cases of the determination of the particular estate; they are only preserved against destructive acts by or with the concurrence of the owner of the particular estate. A contingent remainder still fails of effect, if the particular estate regularly expire before the contingency happens, upon which the remainder vests.

What inter-
posed re-
mainders
prevent ulti-
mate remain-
ders from
vesting.

11. In those cases where contingent remainders are interposed between a particular estate and other limitations over, if the contingent remainder be *not* in fee, but for life or in tail, the subsequent remainder may be vested, provided it be made to a person *in esse*. So a subsequent contingent remainder may become vested in interest before a preceding one, which will be no obstruction to its so vesting. But where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested.¹¹⁵ But a contingent determinable fee, devised in trust for some special purpose only, will not prevent a subsequent limi-

(115) Fearne's Cont. Rem., c. 1, § 8.

tation to one *in esse* from being vested. Where estates are subjected to a general power of appointment in the first taker, with remainders over in default of such appointment, the power does not suspend the remainders from vesting.

12. A contingency with a double aspect, is when *one event only* is expressed by the party, and two events are clearly in his contemplation. This is a construction in favour of the intention, that the intention may not be frustrated. The general rule is, that an interest to commence on a contingency, shall not take place unless that contingency shall arise. It is in a few cases, only, that this favour is extended by construction. The exception seems to have been borrowed from the mode in which remainders are limited, and the construction which the limitations of remainders receive; and under which every estate will take place after the preceding estate, without any regard to the particular time at which, by the words of the remainder, the estate is to take place. In these cases the court proceeds on the intention that the determination of every prior or intermediate estate, shall accelerate the commencement of the more remote estate. It is on similar grounds of intention, that the contingency with double aspect is allowed; for it is allowed on the idea that, by the intent of the testator, the estate limited on a contingency referrible to one estate, shall also take place in case the contingency should not arise on which the prior gift is to vest in interest; and then, in point of law, the contingency has a double aspect: providing, by expression, for a contingency annexed to the interest previously limited, and also, by inference and construction of law, for the event that the contingency on which the prior interest is to vest, shall never arise. This is the nature and import of a contingency with a double aspect.

In *Gulliver v. Wickett*,¹¹⁶ the testator devised to his wife for life, and after her death, to such child as she was then supposed to be *enciente* with, and to the heirs of such child for ever: provided, that if such child as should happen to be born, should die before the age of twenty-one years, leaving no issue of its body, then he devised to other persons: and the wife neither had a child nor was *enciente* with one, and it was held, that the limitation over was good; and in delivering the opinion of the court, Chief Justice Lee observed, “we are of opinion, that whether the limitation to the child never took effect, or whether it did and was determined, was the same thing; and as the remainder to the child never could take effect, the next devise over must take effect.”

Mr. Fearn¹¹⁷ has the following passage on this sort of contingency:—However, we are to remember, that although a fee cannot, in conveyances at common law, be mounted on a fee; yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere; but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect. Thus in the case of *Loddington v. Kime*,¹¹⁸ which was a devise to A. for life, without impeachment of waste, and if he have issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to B. and his heirs for ever; it was held, that the first remainder was a contingent remainder in fee to the issue of A., and the remainder to B. was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect.

(116) 1 Wils. Rep. 106; and 1 Prest.,
85—87.

(117) Cont. Rem. 373.

(118) 1 Ld. Raym. 203.

For if A. had issue male, the remainder was to vest in that issue in fee ; but if A. had no issue male, then it was to vest in B. in fee ; and these were limitations of which the one was not expectant upon, and to take effect after the other, but were cotemporary ; to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed.

13. Cross-remainders are of a complex nature, and grounded upon a tenancy in common. <sup>Cross-re-
mainders.</sup> Remainders of this sort have this denomination, when several farms or parcels of land, or several parts of the same farm or parcel of land, are conveyed to several persons in tail, and these several persons are, by the form of the limitation, to have the farm, parcel, or part of each other, when their respective estates in their respective farms or parts shall determine. These remainders are common to and may be raised effectually under deeds at the common law, limitations of use, and limitations by devise. In deeds they cannot arise without express limitation, at least without words clearly expressing an intention to give remainders of this sort. The reason why cross-remainders cannot be implied in deeds is, that although in a deed the *remainder* may be implied, yet *words of inheritance* cannot be implied so as to determine what quantity of estate is conferred by the remainder. *Nevell v. Nevell*, 1 Rol. Abr. 837. R. pl. 2. The words of inheritance are the only part of the intention of the parties which cannot be implied ; therefore, if no particular words were necessary to limit the inheritance, cross-remainders could be raised by implication in a deed as well as in a will. In wills, marriage articles, and limitations of executory trusts, they frequently arise by implication ; and in distinguishing the instances in which they may and may not arise, great skill and nicety are required. The estate implied must always be an estate-tail, and, therefore, if

the words will not admit of the implication of that estate, cross-remainders cannot arise.

It is not necessary that the parties should, in the first instance, take by way of remainder.

It frequently happens that they take under limitations, which, as to their original shares, confer a right of immediate possession.

Thus, under a gift to A., B. and C., as tenants in common in tail, and in default of the issue of either of them, then to the other or others of them as tenants in common in tail, and in default of issue of all of them, then to a stranger in fee: A., B., and C., are tenants in common of one third each in possession, with remainder as to A., to B. and C. as tenants in common in tail, with remainder as to B., to C. in tail, and with remainder as to C., to B. in tail, and so reciprocally as to the other two thirds.

Lord Mansfield laid down this general rule, viz.:—wherever cross-remainders are to be raised between two and no more, the favourable presumption is in support of cross-remainders: where between more than two, the presumption is against them; but the intention of the testator may defeat the presumption in either case.¹¹⁹

“In a case where cross-remainders were created by a deed, Lord Kenyon declared, that ‘no technical precise form of words is necessary to create cross-remainders, though in the verboseness of conveyancers an abundance of words is generally introduced in deeds for this purpose.’”¹²⁰

(119) Cowp. 780, 77.

(120) 5 T. R. 431.

§ 4. *Executory Devises.*

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| 1. Explained. | | 4. THE MODE OF ENJOYMENT.—Its distribution. |
| 2. The three kinds. | | |
| 3. Wherein they differ from contingent remainders. | | |

1. Mr. Fearnel¹²¹ defines an executory devise to be Explained strictly, such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal, it is more properly an executory bequest) as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise, as to fall within the rules above laid down for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder.

If a particular estate of freehold is first devised, capable in its own nature of supporting a remainder, followed by a limitation, which is not immediately connected with or does not immediately commence from the expiration of the particular estate of freehold, the latter limitation is incapable of taking effect as a remainder, but may operate as an executory devise if confined to the requisite limits of time, as provided by the rule of perpetuity.

Thus, if land be devised to one for life, and after his decease to B. in fee, the limitation to B. is immediately connected with and immediately commences on the expiration of the estate limited to A. during his life, and is, therefore, a remainder; but, if the land be limited to A. for life, and after the decease of A., and one year after his decease, to B. in fee, the interval of the year prevents the limitation to B. and his heirs from being immediately

connected with and from immediately commencing at the expiration of A.'s life estate, and cannot therefore operate as a remainder, but operates as an executory devise. In the same manner, if land be limited to A. for life, and after his decease to B. and his heirs, with a proviso, that if B. shall survive A., and afterwards depart this life without leaving issue of his body living at the time of his decease, the land shall devolve to C. and his heirs; the limitation to B. and his heirs prevents the immediate connection of the estate limited to C. with the life estate of A., and prevents its immediate commencement on the expiration of A.'s life estate, and therefore makes it operate by way of executory devise.¹²²

The three kinds.

2. Three kinds of executory devises have been laid down, viz. :—

(1.) Where a testator devises his whole fee-simple, but upon some contingency qualifies such devise, and limits an estate on the contingency: *e. g.*, a devise of land to the testator's wife for life, remainder to C., his second son in fee, provided if D., his third son, should, within three months after the wife's death, pay 500*l.* to C. or his executors, then to D. and his heirs. D. has an executory devise.

(2.) Where a testator, without disposing of the immediate fee, gives a future estate to arise either upon a contingency, or at a period certain, unpreceded by, or not having the requisite connection with, any immediate freehold, to give it effect as a remainder.

The case of a devise to one, to take effect six months after the testator's decease, is an instance of the first class in this description.

And the case of a limitation to one for life, and from

(122) Butler's note (c) to Fearn, p. 397.

and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose) next ensuing his decease, then over to another, may be adduced as an instance of the latter part of this description.

(3.) The third sort of executory devises, comprising all that relates to chattels, is, where a term or any personal estate is bequeathed to one for life, or otherwise, and after the decease of the devisee or legatee for life, or some other contingency or period, is given over to another person.

It is to be remarked that a remainder can only be limited in freehold estates. In personal property, under which both chattels real and chattels personal are included, there cannot be a remainder in the strict sense of that word; and therefore every future bequest of personal property, whether it be preceded or not preceded by a prior bequest, or limited on a certain or an uncertain event, is an executory bequest, and falls under the rules by which that mode of limitation is regulated.

3. The principal differences between an executory devise and a contingent remainder, are—

Wherein they
differ from
contingent
remainders.

1st. That a contingent remainder may be limited in conveyances at common law; an executory devise is admitted only in last wills and testaments.

2dly. That a contingent remainder relates only to lands, tenements, and hereditaments; an executory devise respects personal estates as well as real.

3dly. That a contingent remainder requires a freehold to precede and support it; an executory devise requires no preceding estate to support it.

4thly. That a contingent remainder must vest, at farthest, at the instant the preceding estate determines; but in respect to an executory devise, if there be any preceding

estate, it is not necessary that the executory devise should vest when such preceding estate determines.

And, 5thly. That the great and essential difference between the nature of a contingent remainder and that of an executory devise consists in this, that the first may be barred and destroyed or prevented from taking effect by several different means; but it is a rule, that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited.

If the executory devise be limited to take effect on an estate tail, then the tenant in tail may by a deed of disposition in conformity with the stat. 3 & 4 Will. 4, c. 74, bar the entail, and all remainders, executory devises, and conditional limitations dependent thereupon. If the executory devise is expectant on an estate in fee, then, as the position intimates, there are no means of preventing it taking effect, if the event happens on which it is to arise.

The mode of
enjoyment.—
Its distribu-
tion.

4. There remains but one branch only of our subject to notice. It is the manner in which the owner's right of enjoying his estate is to be exercised, or, in other words,
THE MODE OF ENJOYMENT.

This subject we will distribute and consider under the five following divisions:—

- (1.) Severalty.
- (2.) Entireties.
- (3.) Joint-tenancy or jointure.
- (4.) Tenancy in common,
- (5.) Coparcenary.

§ 5. *Severalty.*

1. Explained.

1. An estate is held in severalty when the owner has the Explained. right of its enjoyment solely. It is said to be the ordinary mode of holding property. The tenant, having a sole or several estate, distinguishes his interest from a joint-tenancy; and his having the possession of the estate separately to himself, distinguishes his right from an estate by entireties, joint-tenancy, tenancy in common, or coparcenary.

§ 6. *Entireties.*

1. Explained.—2. The peculiarities of this estate.

1. This is a peculiar tenancy, and arises when an estate Explained. is conveyed or demised to a husband and wife jointly during coverture, each is seised *per tout et non per my*, *i. e.*, of the whole estate and neither of a part; they are, therefore, tenants by entireties; for a strict joint-tenancy cannot be created between them during marriage. There is no survivorship of this tenancy, for the whole is in each tenant during the coverture as much as it is in the survivor, after the decease of the other: the survivor takes the whole of the estate by the original limitation, and not by the happening of any subsequent event, as a new acquisition.

2. An estate of this indivisible quality is an exception The peculiarities of this estate. to the rule that husband and wife are one person in law, for if that were the case, the husband might then convey away the whole estate alone; but this he cannot do, for

the wife must concur, by a deed duly acknowledged under the 3 & 4 Will. IV., c. 74, in order to bind her to the transaction, should she survive him.

But an alienation by husband alone, in his wife's lifetime, will, in the event of his surviving her, be good for the interest both of himself and his wife.

When the two tenants by entireties for life convey to another, he takes the whole estate for the survivor's life.¹²³

If an estate be granted to three persons, as joint-tenants, two of whom are husband and wife, these take one moiety as tenants by entireties, and the third person the other moiety; and to enable him to take by survivorship, he must outlive both husband and wife.

It is the legal notion of the unity of two persons, who are husband and wife, which gives occasion to the construction of an *entirety* of interest on their tenancy.

In point of fact, and agreeably to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly, when a grant is made to a husband and his wife and a third person, *as tenants in common*, each of these three persons will severally have a separate and distinct interest in, and tenancy of, a third part.

Also, when lands are granted to them *as tenants in common*, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do.

When an estate is limited to a husband and wife and a third person, jointly, then, as against the third person, the husband and wife have, in point of ownership, a moiety only; and of this moiety, and also of the other moiety,

(123) *Doe v. Wilson*, 4 B. & A. 311.

in case it should become their property by survivorship, the husband and wife will be tenants by entireties ; and as to the whole, the husband and wife and third person will be joint-tenants.

When husband and wife are tenants by entireties in fee, and the wife survives, so that she becomes solely seised, and dies intestate, her heir, it should seem, would take the fee by descent, and the heirs of the blood of the husband, merely as such, would be excluded.

But it is more difficult to ascertain what would be the course of descent of a fee taken by the heir of their two bodies, under a descent to him of an estate-tail to his father and mother, and the heirs of their two bodies, and which he had enlarged into a fee-simple.

He took by descent from his father and mother ; each of his parents was equally the purchasing ancestor. The difficulty is to decide whether the heir of the blood of each parent, or the heir of the blood of the survivor of them, considered as a surviving joint-tenant, should be admitted into the succession.

The probability is, that the decision would, from analogy, be in favour of the heirs of the blood of the survivor.

A gift to a man and woman who afterwards intermarry does not make them tenants by entireties. They are joint-tenants both before and after marriage, and the husband alone may in that case create a severance by aliening his moiety ; and it should be observed, that if a husband and wife hold a term for years as tenants by entireties, the husband alone may assign the term so as to bind his wife surviving.¹²⁴

(124) See 1 Prest. Est. 132, *et seq.*, and the cases there quoted.

§ 7. *Joint-tenancy, or jointure.*¹²⁵

- | | |
|---|--|
| 1. How it is created.
2. The rule of law with the exceptions of equity thereto.
3. Its incidents. | 4. Consequences of the right of survivorship.
5. Its destruction. |
|---|--|

How it is created.

1. This tenancy is created where the same interest in real or personal property is, by the act of the party, passed by the same matter of conveyance or claim *in solido*, and not as merchandize, or for purposes of speculation, to two or more persons in the same right, either simply, or by construction or operation of law jointly, with a *jus accrescendi*, that is, a gradual concentration of property from more to fewer, by the accession of the part of him or them that die to the survivors or survivor, till it passes to a single hand, and joint-tenancy consequently ceases.

This *jus accrescendi* holds place as well in equity as at law. Equitable estates, therefore, are subject to joint-tenancy, and its properties. The trust as well as the term passes to the survivor; and if the estate of two joint-tenants is assigned in trust for them, or such a trust is raised by implication, the equitable interest ensues the nature of the former legal estate.

The Courts of Law and Equity disavour this mode of holding property *beneficially*.

During the feudal rigour, however, and when assurances were simple, joint-tenancy was found to be most useful. It was adopted to prevent dower and curtesy attaching. It avoided wardship, primer seisin, and other feudal imposts of the same description; for the title by survivorship is paramount. A conveyance was made to the father and

(125) This word, in modern times, has acquired another technical meaning, to which it is now almost invariably confined. It signifies that interest which a widow enjoys in lieu of dower.

son, or to several co-trustees, of whom the interested owner was one, and a descent avoided. By the Dower Act, 3 & 4 Wm. IV., c. 105, no title of dower affects a joint estate, whether legal or equitable.

Anciently, joint-tenancy was favoured, because it did not induce fractions of estates.

And now, for the purpose of limitations over, it is much more accommodating than a tenancy in common, unless cross-remainders are expressed or implied. The law itself adopts it sometimes, as in the cases of executors, assignees in bankruptcy, and others, though they differ in some respects from a simple joint-tenancy.¹²⁶

There may be a joint-tenancy for life, or in fee, but not in tail, unless the donees, being male and female, may lawfully marry;¹²⁷ for if not, the donees possess estates for life only, with several inheritances in tail. An estate cannot be granted to two or more jointly *and* severally, for severally is repugnant, and they take as joint-tenants.

2. When an estate is granted to two or more persons without any modifying and disjunctive words, they take, according to the common law rule, as joint-tenants. For example, if an estate be granted to A. and B. for their lives, they become joint-tenants of the freehold: if to A. and B. and their heirs, they are then joint-tenants of the fee. While equity¹²⁸ recognises this rule, yet it has laid down many exceptions to it, amongst the most important of which are the following:—

The rule of law with the exceptions of equity there-to.

(1.) If two join in lending money on mortgage, though they take a joint security, yet equity holds, that it could

(126) Smith on the Law of Joint-ownerships, p. 2.

(127) See *ante*, p. 20.

(128) And in a *will*, the words "in equal shares," "share and share alike," "in joint and equal shares," "jointly and between," "unto and amongst," have been held to constitute a tenancy in common.

never have been intended that their interests should survive, the fair presumption being that each means to lend his own money, and to be repaid his own again. The consequence is, that on the death of one, the survivor, who holds the entire legal estate by survivorship, is deemed by equity a trustee for the personal representatives of the deceased co-mortgagee, until the money be repaid. Equity then treats the two mortgagees as tenants in common.¹²⁹

(2.) When two persons purchase an estate, and advance the purchase-money between them in *unequal* portions, equity treats them as tenants in common, notwithstanding the transfer be made to them generally, but the inequality must appear on the face of the conveyance. If, however, the consideration money be paid by them in *equal* portions, and the transfer is general, then equity has not any ground to infer that this was not a joint purchase of the chance of survivorship, and they must be deemed, even in equity, as joint-tenants. Should one expend money in the repair and improvement of the estate, he will have a claim or lien on the estate for the amount of such money.

(3.) When partners in trade purchase property for the partnership concern, equity treats them as tenants in common, holding the survivor to be trustee of the legal estate for the personal representatives of the deceased partner as to his share. Wares, merchandize, and stock in trade belonging to partners, survive to the representatives of the deceased partner. The *lex mercatoria* excludes the *jus accrescendi* for the benefit of commerce, which is *pro bono publico*, the maxim being *jus accrescendi inter mercatores locum non habet*.

(129) Where a mortgage is made to trustees, who do not appear in that character on the face of the deed, (as it is desirable they should not, lest the title to the land be incumbered with notice of their trust,) it is usual to insert a clause providing against the application of this rule of equity to their case.

3. A joint-tenancy, being created by the convention of ^{its incidents.} parties, must arise out of the *same* deed, will, or claim, for there must exist a unity of *title* between them which must be by purchase, and not by mere operation of law, and the estate must vest in them at one and the same *time* or period; for a joint-tenancy must subsist *ab initio*; an estate cannot become a joint-tenancy by the happening of any circumstances *ex post facto*. The same *interest* must be given to the parties, for one joint-tenant cannot have one estate in the property as for life, and the other another as for years; and they must hold it by the same undivided possession, for each has an undivided moiety of the whole, and not the whole of an undivided moiety.

4. Joint-tenants being seised *per my* ¹³⁰ *et per tout*, ^{Consequences of the right of survivorship.} or, as Coke says, *totum conjunctim et nihil per se separatim*, enjoy a survivorship (*jus accrescendi*) which is held to be as good as a right by descent, the title of the survivor being paramount. It is a continuation of the estate by the survivorship of the tenants, the estate passing among the joint-owners without any perceptible degree of transition, but the diminution of the number of persons to enjoy it. The last survivor takes the whole, as if the estate had originally been given to him only, unless any of his companions have conveyed away his own share in his lifetime, which, of course, each can do; so a partial alienation is a severance *pro tanto*, for *alienatio rei præfertur juri accrescendi*.¹³¹

(130) Mr. Jarman thinks that '*my*' was first used when there was a joint-tenancy between only two; and on becoming technical was afterwards retained; that moiety, however, was frequently used to express any undivided portion of a thing, though not strictly a half.

Littleton takes "*per my*" to mean "every part;" Blackstone "a half or moiety." Mr. Preston says that moiety generally imports an undivided half, but it may mean the entirety of an undivided portion, and is frequently, though inaccurately, used in this sense; and it may even be applied to any undivided share, either more or less than a half.

(131) In this case, the person to whom that share was so conveyed will hold it

The right of survivorship is necessarily reciprocal: for otherwise there would be different degrees of interest in the same estate, which is inconsistent with the nature of joint-tenancy. A body corporate therefore, whose existence has no natural termination, cannot be joint-tenant with a natural person; and as survivorship is necessarily included in joint-tenancy, two corporations cannot be joint-tenants together; for both being considered by the law as of perpetual duration, it is impossible for one to survive the other.¹³²

If all the joint-tenants join in a conveyance, each transfers but his own part. The freehold in joint-tenants is so entire that they cannot grant, nor bargain and sell, nor surrender or devise to each other, much less exchange with or enfeoff one another. No right of dower or curtesy attaches to this estate, for the *jus accrescendi* is preferred to all charges and incumbrances which do not amount to at least a partial alienation of his share; and a devise by a joint-tenant, during the existence of the joint-tenancy, is void. The maxim is, *jus accrescendi præfertur ultimæ voluntati necnon oneribus*.¹³³ By the Wills' Act,¹³⁴ a general devise passes after-acquired property; lands, acquired *jure accrescendi*, will, consequently, pass.

A curious question sometimes arises as to what is the law in case it cannot be proved which of two or more joint-tenants is the survivor. In one case, indeed, it was given

as a *tenant in common* with the remaining original grantee; that is, he will have the same right to occupy the land as the rest, (who, if more than one, will still be joint-tenants among themselves, though tenants in common relatively to him,) and he will be entitled to the same share in its produce as the person was who conveyed to him; but upon his own death his share will descend to his heirs; and he will himself derive no benefit from the death of any of the original feoffees. Such a conveyance, therefore, is called a severance of the jointure; and the tenant in common is not said, like the joint-tenant, to be seised of, or to have a title to, the whole land, though the whole is in his occupation.

(132) Co. Litt. 189 b. 190 a.

(133) Co. Litt. 185.

(134) 1 Vict., c. 26, §§ 3 & 24.

in favour of him who struggled the longest, both being hanged together.—*Broughton v. Randall*, Cro. Eliz., 502.

By the Roman law the relative strength of the parties, presumable from age and sex, was adopted as the criterion for asserting the priority of right. And the Code de Napoleon has adopted the same principle.

By our courts, however, this rule is not considered applicable. Sir W. Wynne in one case (2 Salk. 593), where a father, his children and wife, all perished by shipwreck, considered it more reasonable, in these unhappy cases, to consider all the persons as having died at the same instant, and as being incapable of transmitting rights to each other.

The case of General Stanwix, who, with his daughter, perished by shipwreck (which afforded an interesting topic for the pen of Mr. Fearne, who composed, for amusement, an argument for each of the two claimants, published in his posthumous works) was compromised at the instigation of the Court. The personal representatives of the daughter were claimants on one side, and those of the father on the other, the former being entitled in case she survived her father. The circumstance of one of the parties dying having the legal right, and being in possession, as in the last cited case, afforded grounds for the Master of the Rolls, in *Mason v. Mason*, 1 Mer. 309, to lay down that the representatives of the party not entitled to the possession were bound to prove that that party survived the other, in order to be considered entitled : and Lord Hardwicke appears to have gone on the same ground in a case where husband and wife were shipwrecked together, and the husband, to whom a bill of exchange had been given by his wife's father, had agreed to settle it on her three or four years afterwards, but before that period both were lost. His Lordship inclined to think that since the husband had the legal right, in order that the representatives of the wife might

claim, they must have proved that she survived. So where a husband appointed his wife executrix and residuary legatee, and both perished together, it was held that administration was to be given to the representatives of the husband, the law favouring the last possessor, the proof of survivorship lying on the other side. And where husband and his wife and child perished in shipwreck together, administration was granted to the husband's effects as of a widower.

By the "Trustee Act, 1850" 13 & 14 Vict., c. 60, it is enacted by § 13, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate. Also by § 19 it is enacted, That when any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; that is to say,

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found :

When an heir or devisee of such mortgagee shall, upon

a demand by a person entitled to require a conveyance of such lands, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person :
When it shall be uncertain which of several devisees of such mortgagee was the survivor :

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead :

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee :

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

All emblements go to the survivor. Judgment and crown debts against a deceased joint-tenant do not affect the estate in the hands of the survivor ; but if a joint-tenant alien so as to sever the jointure, or if he become the survivor or sole owner by release, prior judgments against him become available charges on the property.

5. The severance and destruction of this estate may be effected in several ways, as — Its destruction.

(1.) By a deed of partition among the tenants agreeing to hold the property in severalty, for this is a disunion of their possession, and they have then but a separate interest in the several parts of the land, and the *jus accrescendi* is gone.

(2.) By alienation without partition, as by one joint-tenant either releasing his share to the other, or conveying it away to a third person, for this is a destruction of the unity of title. A covenant to sell by a joint-tenant severs the estate in equity, provided it can be specifically performed, but not at law.

(3.) By accession of interest, either by one joint-tenant purchasing the interest of the others, or by acquiring the whole estate by survivorship, whereby the unity of interest is dissolved.

(4) By a decree in Chancery on a bill duly filed, and a commission to divide the land, having been properly issued and regularly returned; the Court then directing a compulsory partition, and ordering the execution of reciprocal transfers.

By the Trustee Act, 1850, § 30, it is enacted, That where any decree shall be made by any court of equity for the performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such

order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court or the said Lord Chancellor might, under the provisions of this act, make concerning the estates, rights, and interests of trustees born or unborn.¹³⁵

§ 8. *Tenancy in Common.*

1. How it is created.—2. Its incidents.—3. Its destruction.

1. This estate is created when several persons have several distinct estates, either of the same or of a different quantity, in any subject of property, in equal or unequal shares, and either by the same act or by several acts. How it is created.

A tenancy in common differs from a joint-tenancy in this respect: joint-tenants have one estate in the whole, and no estate in any particular part; they have the power of alienation over their respective aliquot parts, and, by exercising that power, may give a separate and distinct right to their particular parts. Tenants in common have several and distinct estates in their respective parts; hence the difference in the several modes of assurance by them. Each tenant in common has, in contemplation of law, a distinct tenement, and a distinct freehold.¹³⁶

The best way to create a tenancy in common is either to limit one moiety of the premises expressly to one, and the other moiety to the other, or to use the words “to

(135) Under the General Inclosure Act the Commissioners have power to allot in severalty all the old enclosures and new allotments held in joint-tenancy, tenancy in common, or coparcenary, whatever may be the disabilities of the parties.—41 Geo. III., c. 109, § 16.

(136) Lord Hardwicke has remarked, that though an estate in common may be held by unequal shares, yet it cannot be by uncertain shares; for it is essential that it should appear on the face of the instrument creating it what the specific interest of each tenant is. The question arose on a devise of so much property to A. as the man she should marry possessed, and no more. *Jones v. Hancock*, 4 Dowl. 145. It has been also held, that a contract for a tenancy in common is so entire that a court of equity will not decree a specific performance as to one moiety, a decree being improper as to the other. *Attorney General v. Day*, Suppl. by Belt, Vcs. sen. 121.

hold as tenants in common and not as joint-tenants;" as the law may otherwise construe it a joint estate.¹³⁷

It may also be created whenever an estate in joint-tenancy or coparcenary is dissolved by the severance of the title or interest, so that there be no partition made, but the unity of possession continues.

A tenancy in common may be by prescription: as the tenants prescribing for themselves and their ancestors that the estate had been left in common for a time, which will make a good prescriptive title.¹³⁸

Its incidents. 2. Tenants in common hold by unity of possession, because neither of them knows his own severalty, and therefore they all occupy promiscuously. This is the only unity belonging to the estate; for since the tenants may hold different kinds of interests, so there exists no necessary unity of interest, and there is no unity of title, for one may claim by descent, and another by purchase; also the estate may vest in each tenant at different times. There being no entirety of interest among tenants in common, each is seised of a distinct though undivided share; they hold *per my et non per tout*, and consequently the *jus accrescendi* does not apply to them

Its destruction.

3. This estate is dissolvable.

(1.) By a deed of partition.

(2.) By the union of all the titles and interests in one tenant by grant, devise, surrender, or otherwise, which reduces the whole estate to a severalty.

(3.) Or by compulsive partition, under a decree in Chancery.

(137) In a will, the words "equally to be divided"—"equally between or to them"—"equally" alone—"respectively"—"rateably" "share and share alike," and words of a similar distributive import, create a tenancy in common, as well in respect of real as personal estate.

(138) Litt. § 310.

§ 9. *Coparcenary.*

1. How it is created.
2. Its incidents.

3. Its destruction.
4. *Résumé.*

1. A tenancy in coparcenary arises when an inheritable estate descends from the ancestor to several persons possessing an equal title to it. It arises by act of law only, *i. e.*, by descent, which, in relation to this subject is of two kinds: (1.) Descent by the common law, which takes place where an ancestor dies intestate, leaving two or more females as his next co-heiresses, these, according to the canon of real property inheritance, take altogether as coparceners or parcnery, the law of primogeniture not obtaining among women in equal relationship to their ancestor; they are, however, deemed to be as one heir; and (2.) Descent by particular custom, as gavelkind lands, which descend to all the males in equal degree, as the sons, brothers, or uncles of the deceased intestate ancestor: in default of sons, they descend to all the daughters equally.

Coparcenary relates to the estate—joint tenancy to the person.—Hence a man may be coparcener with himself. Suppose two moieties of an estate to descend upon the same individual, one from his father, and the other from his mother, he may fairly be said to possess the estate in coparcenary; for on his death without lineal descendants, one moiety will descend to his heir on the part of his father, and the other to his heir on the part of his mother.

2. Coparceners have a unity, though not an entirety, or necessarily an equality of interest; if there be two only, each is properly entitled to the whole of a distinct moiety; and being seised in moiety there is no *jus accrescendi* between them, for on the death of one of them intestate,

her moiety descends to her heir at law, who holds, subject to curtesy (if any), with the surviving parcener in coparcenary, although such heir may be a male, and a collateral. Indeed their estates are held in coparcenary, so long as they claim by descent. As soon as any part is severed, by conveyance from the title of the remaining part, the part so severed will be held in common.

Between the alienee and the other coparceners, there will be a tenancy in common. The remaining coparceners will, as between themselves, continue to hold in coparcenary.

They are seised both jointly and severally, and possess a unity of title, but the estate may vest in them at different periods.

Coparcenary is like joint-tenancy so far as the same unity of title and similarity of interest is common to both, but they differ in this, that while coparceners always must claim by descent, for if two sisters purchase an estate to hold to them and their heirs, they are not parceners, but joint-tenants; joint-tenants always claim by act of parties.¹³⁹

Its destruction.

3. This estate may be dissolved in any of the following modes:—

(1.) By a deed of partition, as

(α) Where they agree to divide the estate into equal parts in severalty, each to have a determinate position.

(β) Where they appoint some third person to

(139) Coparcenary is intermediate in its nature between joint-tenancy and tenancy in common. There is a unity of title, but no benefit of survivorship; for the share of a coparcener dying seised descends to her heir, who holds it also as coparcener. A joint-tenant cannot convey his share to his companion by feoffment, because each is supposed to be equally seised of the whole; but he may convey it by release. Tenants in common, on the contrary, may convey to one another by feoffment, but not by mere release. But coparceners may adopt either mode.

divide the estate, and after a division by him, each coparcener, according to seniority of age,¹⁴⁰ or as shall be agreed between them, selecting her own portion.

(γ) Where the eldest coparcener divides the estate, in which case she takes the portion remaining after her sisters have made their choice.

(δ) When they agree to cast lots for their shares.

(2) By the alienation of one of the parties, which destroys the unity of title.

(3.) By all the estate at last descending to one person, which reduces it to a severalty, and

(4.) By a compulsive partition under a decree in Chancery.

4. In conclusion, it may, perhaps, be useful to exhibit *Résumé* in one view, by way of summary, the method, which has been followed, in the development of the subject. We have treated of estates—

1st. As regards their quantity; and

2nd. As regards their quality.

As regards their quantity we distributed estates into orders, and these orders into species, thus :—

Order I. Fees, or inheritable freeholds ;

Species (1.) Fee-simple absolute,

(2.) Fee-tail,

(3.) Fee-qualified, or base.

(140) The privilege of seniority is in this case personal ; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay, her husband, or her assigns, shall present alone, before the younger. And the reason given is, that the former privilege, of priority in choice upon a division arises from an act of her own, the agreement to make partition, and, therefore, is merely personal ; the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also.

Order II. Life-freeholds ;

- Species (4.) For the life of the tenant,
 (5.) For the life or lives of others,
 (6.) Tenancy in tail after possibility of
 issue extinct,
 (7.) By the curtesy of England,
 (8.) In dower.

Order III. Chattel-Interests.

- Species (9.) Term for years,
 (10.) Tenancy from year to year,
 (11.) Tenancy at will,
 (12.) Estate by elegit,
 (13.) Tenancy on sufferance.

Having shown the difference between these thirteen different species of estates, together with their distinguishing peculiarities, and having touched upon the principles of our laws applicable to them individually, we addressed ourselves to the second branch of our subject, and—

As regards their quality, we subdivided estates into—

- I. The time of enjoyment, and
- II. The mode of enjoyment.

As regards the time of enjoyment we treated it under these heads :—

- (1.) Possession,
- (2.) Reversions,
- (3.) Remainders, and
- (4.) Executory devises, and

As to the modes of enjoyment, we explained it, by a division into—

- (1.) Severalty,
- (2.) Entireties,
- (3.) Joint-tenancy, or jointure,
- (4.) Tenancy in common, and
- (5.) Coparcenary.

We now take leave of this interesting and voluminous subject, with a full consciousness of our imperfect mode of handling it, and of the many deficiencies and shortcomings with which the essay abounds. Confined in space, and unassisted by those aids, which great skill and extensive knowledge derive from kindred science, we dare not claim more for ourselves than a diligent care and an anxious collation of the best authorities.

TRACTATE II.

COPYHOLDS, CUSTOMARY FREEHOLDS, AND ANCIENT DEMESNES.

" Our laws of property are so connected with each other, that some relation to the doctrine of Copyholds may be traced in most of them."—WATKINS.

INTRODUCTORY.

THE two modern tenures,¹ or manners of holding realty, are FREEHOLD and COPYHOLD, from either of these the derivative tenure of LEASEHOLD may arise.

(1) Mr. Hayes has this passage in his Introduction to Conveyancing, Vol. I., p. 5, *et seq.*:—"The grand characteristic of real property was tenure. Every subject of the realm, possessed of land, held it in subordination to some superior, who exacted homage and service, in return for patronage and protection. Land purely allodial, over which the possessor enjoyed the entire and irresponsible dominion, ceased to exist. The king, at once the source of property, and the fountain of justice and honour, had bestowed large territories on the great barons who immediately surrounded the throne, and these again had distributed his bounty through the channels of their numerous dependents. In legal contemplation, at least, all the land-owners of the kingdom had thus derived their estates. On this hypothesis, so consonant to the genius and history of fiefs, the system of tenures was built; a system, which linked every feudatory, by a chain more or less extended, to the crown, and rendered his fief eventually liable to resumption by the sovereign power, from which it had, or was assumed to have, originally proceeded. In all societies, indeed, it seems requisite to constitute an *ultimus hæres*. Among the nations who conceived, in the forests of Germany, the first rude design of our institutions, land was restored, on a vacancy of the possession, to the community or state; here, it reverted in the king as the supreme head of the federal body. The chief who received a grant of land, dedicated the greater portion to arms and ambition, parcelling it out among his voluntary followers in the field, to be held on the honourable condition of military service; another portion he allotted to an inferior, yet not degraded, caste, to be held in socage, which some writers (for the learned are not agreed upon the point) interpret to mean plough-service; and the residue he retained to be cultivated by his villeins, or serfs, who were attached to the soil, rather by the chain of slavery, than by the bond of tenure. From the two former

Freehold tenure, known in ancient times by the phrase "tenure in free socage," is the only free lay² mode of holding property; it is derived from the feudal system, but the services connected with it were always accounted honorable, and of a mild and somewhat independent character. The annihilation of the feudal severities has left this tenure unshackled, and by far the greater part of the real property in this country is, at this day, freehold.

Copyhold, the other chief tenure, forms the subject of this "Tractate."

With regard to the derivative tenure,—Leasehold,—its learning will occupy our attention at some future period.

classes have proceeded the freeholders, and from the latter class the copyholders of the present day."

(2) We say "lay," to distinguish it from the peculiar ecclesiastical tenure of frankalmoin, which is occasionally met with.

CHAPTER I.

COPYHOLDS, THEIR ORIGIN, NATURE, AND REQUISITES.

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| <ol style="list-style-type: none"> 1. Whence derived.¹ 2. The four attributes of a copyhold. 3. A <i>manor</i> described. 4. Distribution of a manor. 5. How a manor may be divided. 6. How suspended. 7. How determined. 8. The lord of a manor. 9. The steward of a manor.—Forms of appointment of steward and deputy steward. | <ol style="list-style-type: none"> 10. The <i>Courts</i> of a manor. 11. The Court Baron. 12. The customary Court Baron: 13. The Court Leet. 14. A copyhold must be <i>parcel</i> of the manor. 15. And demised, as such, from <i>time immemorial</i>. 16. General doctrine of customs: 17. What property is demisable by copy. 18. Who incapable of being copyholders. |
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AMIDST the crash of feudalism, which was effected by the legislature in the reign of the restored Stuart, the mark of servility was unhappily preserved in one great tenure of realty, and proclaims that we were once an enslaved nation, and that the people were distributed into the tyrant and the serf.³ Doubtless the law should have swept from

(3) Villeinage, properly so called, was, happily for this country, and the cause of civil liberty, abolished by the memorable statute of 12 Car. II., c. 24 ; yet there is a proviso in that statute, which declares that it shall not be construed to extend to change or alter any tenure by copy of court roll, or any services incident to that tenure ; and from this proviso we may learn, that in the opinion of the legislature, copyholds had some connection with the feudal system. Indeed the fact was so ; and at this day it may perhaps be said, that copyhold tenure is nothing but pure villeinage, divested of its servile appendages by the hand of time. Custom or prescription is the principal foundation of the immunities which copyholders now enjoy, and is the life of their estates. For though they hold them at the will of the lord, like their ancestors the villeins, yet, observe, it is according to the custom of the manor, and while they perform the services which that custom imposes on them (light and easy as they are, compared with the drudgery of pure villeinage in its original state), their property is secure from the invasions of the lord, they have a permanency in it, and can call it their own. Doctor and Student, dial. ii., c. xviii.

the green fields of our fair isle all trace of despotism, every vestige of human slavery, and have extinguished copyholds, the last faint badge of servile oppression. But this has not been effected, and its remains, modified by statute and reduced to mere farce by modern innovation, shall now be exhibited in the peculiar doctrines and practice of copyholds.

Whence derived.

1. The origin and antiquity of copyholds is undiscoverable. They are said to be the ancient villeinage, modified and changed by the commutation of base services into specific rents, either in money or money's worth.⁴ Sir Martin Wright, in the conclusion to his *Law of Tenures*, says, "Copyholds are the remains of villenage, which, considered as a tenure, was not entirely Saxon, Norman, or Feudal, but a tenure of a mixed nature, advanced upon the Saxon bondage, and which gradually superseded it: so that we must look partly at home for its original, which, though it cannot be traced without running into greater length and nicety than would be agreeable to my present design, may possibly be hinted in a very few words: for if the Normans found, as we are assured they did, a sort of people among us who were, as Sir William Temple says, in a condition of downright servitude, used and employed in the most servile works, and belonged, they, their children and effects, to the lord of the soil, like the rest of the stock or cattle upon it, nothing is more likely than that they, who were strangers to any other than a feudal state, should enfranchise all such wretched persons as fell to their share, by admitting them to fealty, in respect of the little livings they had hitherto been allowed to possess merely as the scanty supports of their base condition, and which they were still suffered to retain upon the like services, as they had in their former servitude been used and

(4) *Grant v. Astle*, 2 Doug. 724 n.; *Garland v. Jekyll*, 2 Bing. 292; and *Clements v. Scudamore*, 1 P. Wms. 64.

employed in: but this possession, as now clothed with fealty, and by means thereof advanced into a kind of tenure, differed very much from the ancient servile possession, and was from henceforth called villenage.

“ Our Saxon ancestors again having, as above, submitted to the feudal law, which was a law of liberty, may be supposed to have imitated, some sooner than others, the generosity of the Normans, and to have done the like: but neither did our Saxon or Norman ancestors mean to increase or strengthen the possession of their villeins, but meant to leave that altogether as dependant and precarious as before, save only that, as by their admission to fealty, their possession was put, in some measure, upon a feudal foot, their lords could not, in regard to the fealty implied on their parts, deal with them so wantonly as before; nor could they, so long as they answered the services and conditions of their possessions or tenure, in honour or conscience deprive or remove them: and yet they were for a long time left merely to the conscience of their lords, which they might, as they could, awaken by their petitions, but could not otherwise deal with; until the uninterrupted benevolence and good nature of the successive lords of many manors, having, time out of mind, permitted them, or them and their children, to enjoy their possessions in a course of succession, or for life only, became at length customary and binding upon their successors, and advanced such possession into the legal interest or estate we now call copyhold, which yet remains subject to the same servile conditions and forfeitures as before, they being all of them so many branches of that continuance or custom which made it what it is.

“ From this view of the original and nature of copyholds, we may possibly collect the ground of the great variety of customs that influence and govern these estates in different manors; it following from the preceding account, if true, that they are no other than customary estates, after the ancient will of the first lords, as it is preserved and evi-

denced by the rolls, or kept on foot by the constant and uninterrupted usage of several manors wherein they lie.”

The four
attributes of
a copyhold.

2. There are four things necessary to the existence of a copyhold:—

(1.) A manor.

(2.) A court.

(3.) The lands must be parcel of, and situate within, the manor of which they are held, and

(4.) They must have been demised or demisable by copy of court roll from time immemorial.⁵

We will illustrate these attributes in the order indicated.

A manor
described.

3. The whole territory, which was personally enjoyed by the Sovereign or his great captains, was denominated his barony, honor, or lordship, and, in the language of the present day, his manor, out of which is carved copyhold. The etymology of “manor” is purely conjectural. Coke derives it from the French *mesner*, to govern or guide, because the lord of the manor had the guiding and directing of all his tenants within the limits of his jurisdiction. Bracton, Spelman and Cowel say it is derived either from the French *manoir*, or from the Latin *manendo*, as the usual residence of the owner on his land.⁶

A manor, then, comprehends messuages and lands, with their appurtenances, and is the district or aggregate compass of ground granted by the ancient kings of this realm to their lords or barons, with liberty to parcel the lands out to inferior tenants, reserving such duties and services as they thought proper, with power to hold a court (thence called a court baron), for redressing misdemeanors, punishing any offences committed by their tenants, and settling disputes of property arising between them.⁷

(5) Co. Litt. 58 b.

(6) 1 Watkins on Copyholds, 2d edit. 10 ; 1 Scriven on Copyholds, 4th edit. 1 ; Co. Litt. 58 a ; Spelm. Gloss., *voce* “Manerium.”

(7) 1 Scriven on Copyholds, 1.

4. The lord reserves some portion of the manor in his own possession, which is called the demesne lands of the manor, and grants out the greater part of the rest amongst his tenant copyholders, which are called the tenemental lands of the manor, the remaining portions being uncultivated and forming the lord's wastes.⁸

Distribution
of a manor.

No manor can, in modern times, be created, of which a copyhold can be held, for it must be held according to the custom of the manor, and a custom, it is said, must be from time whereof the memory of man is not to the contrary. Custom is the very essence of a copyhold, for which reason the crown itself possesses no prerogative to create a copyhold, for that which receives its perfection from long continuance of time, comes not within the compass of the royal prerogative.

The title to copyholds is both constituted and modified by custom, which, although exceedingly diversified, yet possesses many peculiarities, exhibiting a coincidence of character.

5. A manor may be divided by act of law, but not by act of parties: *ex. gra.*, if a manor descend to several coparceners, and they make partition and parcels of the demesne, and services are allotted to each, then each has a manor, being in by act of law, for they were compellable

How a manor
may be
divided.

(8) By 4 & 5 Vict., c. 35, § 91, it is provided, "that where by the custom of any manor the lord of such manor is authorised, with the consent of the homage of such manor, to grant any common or waste lands of such manor to be holden of the lord by copy of court roll, nothing in this act contained shall operate to authorise or empower the lord to grant any such common or waste lands without the consent of the homage assembled at a customary court holden for such manor, nor shall any court holden for such manor be deemed or taken to be a good or sufficient customary court for such purpose, unless the same shall have been duly summoned and holden according to the custom of such manor in such cases used and accustomed before the passing of this act, and unless there shall be present at such court a sufficient number of persons holding lands of such manor by copy of court roll to constitute according to such custom a homage assembled at such court."

to make partition at common law; but the rent and services of any one particular tenement cannot be apportioned on such partition. Though the manor can be thus divided, the tenancy cannot. Joint-tenants making partition cannot divide the manor, for they enjoy by purchase, *i. e.*, by act of parties, and therefore they must join in holding courts.⁹

One manor may be held of, and become part of another manor.¹⁰

How suspended

6. A manor may be suspended for a time, and revive again, as where the lord leases all the demesnes of the manor for a term of years; the manor, during the existence of the lease, is suspended, but, on the expiration of the

(9) Before the Statute of *Quia Emptores Terrarum* (18 Edw. I. st. 1, West. 3), as a manor might have been created, so it might have been divided, and the number of manors, of consequence, increased. But if, according to the doctrine before noticed, a manor could not have been created since the passing of that act, by a tenant of a common lord, it should seem to follow, that, since the passing of that act, a manor cannot be divided into separate manors, by the tenant of a common lord, as such division would be a multiplication in effect. However, a distinction has very properly been made between a division by act of law and a division by act of the party. It appears to have been acknowledged by the ancient books, and often recognised by later authors, that a manor might have been divided, subsequently to the Statute of *Quia Emptores*, by act of law. But whether a manor can be divided by the act of the party does not appear to be by any means settled. Most of the ancient cases are relative to acts of law, and most of the modern ones are deductions from them. In *Sir Moyle Finche's Case* (6 Co. 63 a), a distinction was taken between acts of law and of the party; and Sir Edward Coke affirms, in a note to *Melwich's Case* (4 Co. 26 b), that a lord cannot, by his own act, make of one and the same manor, at the common law, sundry manors consisting of demesnes and freeholders. There is, however, a great contrariety of opinion on this point, as may be seen in the books cited in the margin.* To reconcile these would be a task of no small difficulty. But, I must confess, that none of the ancient cases, that I am aware of, many of which are so generally referred to, by any means amount, in my conception, to warrant the doctrine that a manor may be divided by the act of the party; and the inconveniency, if not the nature of the thing, militates, I think, strongly against the adoption of such a doctrine. 1 Wat. c. 1. 1 Scriv. Cop. pp. 7—14.

(10) See 11 Co. 18 a.

* *Gilb. Ten.* 210.12; *Cro. Eliz.* 19; *Harris & Haies v. Nicholls*, *ibid.* 38; *Morris v. Smith* and *Paget*, 1 Leo. 36; *Marsh v. Smith*, *Cro. Eliz.* 300; 4 Co. 26 b; 6 Co. 63 a, &c.; and see 15 *Viner*, 228, "Manor G."

term, it shall revive; so, if a manor descend to two parceners, and on partition the services be allotted to one, and the demesnes to the other, and the one die, the manor shall revive; for it was suspended only, and not destroyed.

7. A manor is absolutely determined, if the demesnes and services are once, by the act of the parties, severed in fee-simple, or if all the demesnes and services be granted to a stranger, or become extinct; but although the manor is lost, so far as relates to the holding of courts, yet it may be a manor by reputation, to sustain minor prescriptive rights.¹¹ It will cease to be a legal manor, though it may still be a seignior¹² or manor in gross, the lord of which may possess the right and interest of a court baron, with the perquisites attached, while every part of the land belongs to others.

How determined.

Under a local inclosure act, when there is no special provision to the contrary, the legal title to the allotment is not acquired by the allottee until the execution and proclamation of the commissioners' award. The award, however, is rather evidence of title, than constituting title.

8. A few words upon the qualification of a lord of a manor.

The lord of a manor.

The infancy, idiotcy, or lunacy of the lord of a manor, or his being an outlaw, an excommunicate, a feoffee on condition, guardian in socage, tenant in tail, for life or for years, or even at will, tenant by the courtesy, statute or *elegit*, or his being a bishop or other ecclesiastic, seised in right of his bishopric or church, will not disable him from making a voluntary grant in fee, or for such estate as is authorised by the custom of the manor, which grant would

(11) *Soane v. Ireland*, 10 East, 259.

(12) It is called a seignior, if only the services are retained; it is a manor, when any part of the land is reserved with them.

be good, notwithstanding the interest granted should continue longer than that of the lord.

It is supposed¹³ that if there be two joint-tenants of a manor, and a copyhold escheat, one of them may grant the entirety of this copyhold, each being seised *per mie et per tout*; yet this power has been doubted.¹⁴

Whatever estate the lord may have in the manor, it is essential that he be *legitimus dominus pro tempore*, and be seised in possession, or, at least, derive his power from a person who is the lord *pro tempore*.

The lord has not only a legal, but an equitable authority. He sits in his court as chancellor, and may redress matters in conscience, upon bill exhibited, where the common law will afford no remedy in the same kind. But the lord need not hold his court himself, he may appoint a steward to hold it for him.

The steward
of a manor.

9. The steward of a manor is the lord's deputy, who transacts all the legal and other business connected with the estate, and takes care of the court-rolls, to which every copyholder has a right of access, for they are the evidences of his title. The Court of Queen's Bench will enforce this right. In the royal manors, the steward is appointed by patent. By 10 Geo. IV., c. 50, § 14, the commissioners for the time being of his Majesty's woods, forests and land revenues, from time to time, are authorized to appoint such persons as they shall think fit, to be the stewards of any hundreds, honors, manors or lordships, being part of the possessions or land revenues of the crown, to which the act relates, with power and authority to hold and keep all and singular hundred courts, courts leet, view of frankpledge, courts baron, and customary and other courts, within the limits and precincts of such hundreds, honors, manors or lordships respectively, and to perform and execute all things belonging or incident to

(13) 1 Wat. Cop. 26.

(14) *Lancaster v. Lucas*, 1 Lco. 234.

such offices. In other manors the chief steward is usually appointed by deed, though he may be appointed by parol; but corporations must always appoint by deed under their corporate seal.

The following is a form of appointment of a steward to a customary court baron, with the powers created by 4 & 5 Vict., c. 35.

“ Know all men by these presents, that I, —, lord of the manor of —, in the county of —, have made, ordained, constituted and appointed, and do hereby make, ordain, constitute and appoint — of —, to be steward of the aforesaid manor of —, and the members thereof, with full power and authority, from time to time, to hold courts baron and customary courts for the same manor and its members, and to do all acts usual and customary to be done by stewards in relation thereunto, and also all acts authorised to be done by stewards, either within or out of the manor, and without holding a court, by and under the provisions of the act of Parliament of 4 & 5 Vict., c. 35 (§§ 87 and 88), accounting to me, from time to time, for such fines, heriots, reliefs, forfeitures, amercements and other manorial profits, as shall be received by him or by his deputy, or deputies; and I do hereby more especially authorize and empower the said —, from time to time, as there may be occasion, to make any voluntary grants of all or any customary or copyhold lands within the said manor, and to give and execute to the tenants thereof, any licenses to demise or otherwise as he the said — shall deem expedient, and either in or out of court, and either in or out of the manor, as fully as I myself could or might do; and also to appoint any deputy-steward or deputy-stewards, of or for the said manor of —, and its members, with full power to hold all or any such courts as aforesaid, and to do such other act or acts as he the said — could or might do, as chief steward of the same ma-

Form of appointment of steward.

nor ; and also to depute any person or persons to act under him as sub-deputy steward or sub-deputy stewards of the said manor, as occasion may require ; but such appointment of a deputy or sub-deputy steward, for the purpose of any act out of court, to be made by deed only, and not by parol. And I do hereby ratify and confirm all or whatsoever the said —, or such his deputy or deputies, sub-deputy or sub-deputies, shall lawfully do or cause to be done by virtue of these presents, hereby declaring that this appointment shall continue in force during my will and pleasure only. In witness whereof I have hereunto set my hand and seal, this — day of —, in the year of our Lord —.

Sealed, &c.

The lord's signature

L. S.

The appointment of a steward is generally during the lord's pleasure (as in the above precedent) ; it may, however, be for years or for life, forfeitable by abuser, misuser, non-user, or refuser. The steward's remedy for a disturbance of his office, is an action on the case for consequential damages. The court of Queen's Bench will, upon a proper case made out, grant a writ of *mandamus* to restore a steward to his office. A steward may depute or authorise another to hold a court ; and the acts done in a court so holden will be as legal as if the court had been holden by the chief steward in person. So an under-steward or deputy may authorise another as sub-deputy, *pro hac vice*, to hold a court for him, such limited authority not being inconsistent with the rule "*delegatus non potest delegare*."

This deputy, or under-steward, may be appointed either in writing, or by parol, although the appointment of the chief steward should not contain an express authority for that purpose. The following is a form :

Form of appointment of deputy-steward.

" Know all men by these presents, that I, —, steward of the manor of —, in the county of —, by virtue

of the power and authority to me given in this behalf by —, lord of the said manor of —, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute and appoint — of —, to be my deputy-steward of the aforesaid manor of —, and the members thereof, with full power and authority from time to time to hold courts baron and customary courts for the same manor, and its members, and to do all such acts in the performance and execution of the duties of the said office, as I myself could or might do, being personally present; and with liberty and authority to depute any person or persons to act under him as sub-deputy steward or sub-deputy stewards of the said manor, as occasion may require, he the said — accounting to me, from time to time for such fines, heriots, reliefs, amercements and profits of court, and all fees and perquisites whatever arising from the said office, upon being required thereunto; and I do hereby declare that this appointment shall continue in force during my will and pleasure. In Witness, &c.

Sealed, &c.

Steward's signature

L. S.

The lord of a manor, or his chief steward, may appoint, either in writing or by parol, a bailiff or reeve, who is merely a ministerial officer.¹⁴

10. The second attribute of a copyhold is a court, for a copyholder has no other evidence of his title than the rolls of the court.

The courts
of a manor.

It is necessary to distinguish the several courts which belong to a lord of a manor, into (1) a court-baron, (2) a customary-court, and (3) a court-leet. The court-baron is the court of the frank tenants, to which every *freeholder* of the manor is obliged to do suit. The customary-court is

for those who hold of the manor by copy or base tenure, *i. e.*, for the *copyholders*. The court-leet is not, like the two former, incidental to the manor, but is held by virtue of a special charter from the crown.

The court
baron.

11. The court-baron, which is not one of record, is incident to every manor, and cannot be severed therefrom. It was ordained for the maintenance of the services and duties stipulated for by lords of manors, and for the purpose of determining actions of a personal nature, where the debt or damage was under forty shillings.

This court may be held at any place *within* the manor, giving fifteen days' notice, including three Sundays, of the day when the court will be held; but three or four days notice have been deemed sufficient. It is frequently held together with the court leet. It generally assembles but once in the year.

The *freehold* tenants alone are suitors to the court baron; and it is essential to the existence of the court that there should be two suitors at the least; for since freemen can only be tried by their peers or equals, should there be but one freeman, he can then have no peer or judge, and consequently he must appeal to the court of the lord paramount. The suitors of a court-baron constitute its judges. The steward is a constituent essential part of the court, and not a mere ministerial officer, for the court cannot be holden without him.¹⁶

A court-baron not being a court of record, neither the lord nor his steward can fine or imprison.

The tenants of a manor may make by-laws touching their commons and the like, to bind such tenants as assent thereto, unless they be made by prescription, or under an immemorial custom. These laws can never bind strangers. The penalty for the breach of a by-law is in the

(16) *Holroyd v. Breare and Holmes*, 2 Barn. & Ald. 473.

nature of a fine, rather than amercement, and is not affeerable, *i.e.*, assissable.

12. The customary court-baron should be kept within the manor for which it is held, but it may be held anywhere within the manor, at the pleasure of the person holding it, unless some ancient custom require it to be held at a certain place.

The customary court baron.

The court-baron was to be held from three weeks to three weeks, or, as some think, as often as the lord chose. And it should seem clear, that the lord may hold a customary court as frequently as he pleases, and compel the attendance of his tenants who hold by villein or base services.¹⁷

We shall presently state the rules to be observed in convening a customary court-baron, when we speak of the practice of transferring copyholds.

It is to be observed, that although there should be no freeholders of the manor, by which the court-baron or freeholders' court is lost, yet still there may be a customary court; for as these two courts are distinct, the want of freeholders does not preclude the lord from holding a customary court for his copyholders.¹⁸

13. The court-leet¹⁹ is a court of record. Its jurisdiction and privileges were purchased of the crown, by the possessors of large estates, that the people might have justice rendered to them nearer to their own homes. This court may be appendant to a hundred as well as to a

The court leet.

(17) 2 Watkins, c. i., p. 9.

(18) 1 Cruise's Dig. tit. x., c. 1, § 19.

(19) Coke says, *leet* is a Saxon word, and comes from the verb *gelathian*, or *gelethian* (*g* being added *euphoniæ gratia*), *i.e.*, *convenire*, to assemble together *unde conventus*. 4 Inst. 261. It is also said to be derived from *let*, signifying *censura*, *arbitrium*, "because this court redressed wrongs by way of judgment, against any person of the frank-pledge who had done any wrong or injury to another." Lex. Man. 131. Others suppose it to be derived

manor; and it may also be appendant to a vill or to an ancient messuage.

A leet, held by charter, must be kept on the days mentioned in the charter; and when held by prescription, it must be kept at the customary time. The court leet may be adjourned, when requisite, by three proclamations. It may be held at any place within the precinct, where the lord pleases, except the church, chapel, or church-yard. Usually fifteen days' notice is given. Suit to the leet is due by reason of resiancy or abode, and has no reference to tenure; it is therefore called suit-real, and not suit-service. The attendance is usually essoined on the payment of a nominal sum. Since the leet was originally granted, for the more convenient administration of justice, the lord is compellable to hold a court by *mandamus*, and a leet is forfeited by non-user and by acts of abuser. A long dis-user of the franchise will induce a suspicion of defect of title.²⁰ The usurpation of a leet has been adjudged an indictable offence.²¹

The steward of a court-leet is an essential officer, and should be indifferent between the lord and the law;²² for he is the judge, and presides in the court wholly in a judicial character; the ministerial acts of the court, such as impannelling the jury, are executed by the bedell or bailiff, sworn to a due performance of his duty. The steward may fine or imprison, and may take a recognizance of the peace: he cannot appoint a deputy, unless he be so empowered in his patent or deed of appointment, or there exist an established custom for it. All fines are recover-

from the Saxon *leod*, *plebs*, and to mean the *populi curiæ*, or folkmote. Ritson on Court Leet. Scriven derives it from the Saxon, *led*, to assign or grant, being a juridical franchise held by a subject under a grant from the crown. 2 Scriv. Cop. 677, note *y*.

(20) 1 Sir W. Bl. 47.

(21) 6 Mod. 183.

(22) See Powell on Courts Leet, p. 43.

able by action of debt or by distress. A fine is imposed by the court, but an amercement is generally the act of the jury; it must always be affected in open court, by two or more persons appointed by the steward, and duly sworn, and is then recoverable by distress or action.

By-laws, embodied in the presentments and verdicts of the jury, and homage, may be good by custom.

In some manors, the jury of the court-leet choose the mayor, port-reeve, or other chief municipal officer of the borough or town to which the leet jurisdiction is appended, while, in others, the jury present in writing the candidate who may have the majority of votes, but have no control over the poll. The bailiff is sometimes chosen by the jury; but the steward or the lord may have the appointment by custom. The right to elect constables, tithing-men, and third boroughs, is vested in the jury. In ancient times, ale-conners and leather-sealers were chosen at the court-leet. An officer, called the hayward, is now appointed; his duty is to keep the lanes clear, by impounding stray cattle that he may find there.

All offences cognizable in the leet, are enquired of and presented by the suitors of the court, sworn and charged as a jury for that purpose; and all presentments may be removed, by *certiorari*, into the Queen's Bench, and then traversed.²³

14. A copyhold must, in its very nature, be situated within and be or have been parcel of the manor, since it is obvious that nothing can be granted by the lord of a manor, as a copyhold, which is not part of the demesnes of the manor.²⁴

A copyholder must be parcel of the manor.

15. The fourth attribute is that copyholds must be held

And demised as such from

(23) For the articles inquirable in the court-leet, see 2 Scriv. Cop. p. 730.

(24) Co. Litt. 58 b.

time immemorial.

by copy of court roll at the will of the lord, according to the custom of the manor, and from time immemorial.

It must plainly appear that a grant of copyhold land is duly entered on the rolls of the manor court. A copyholder must hold at the will of the lord, though he cannot be deprived of his lands but by his own acts or misconduct. Their tenure must be according to custom, which must have existed time out of mind. "Albeit," says Sir Edward Coke,²⁵ "he is tenant *ad voluntatem domini*; yet it is *secundum consuetudinem manerii*."

All copyholders, it must be remembered, are, in legal intendent, tenants, *at the will* only, of their lords, so far as they are to be considered as the *tenants* of a legal estate. Considered as beneficiary and customary tenants, in the nature of *cestui que trusts*, they have an estate according to the quality and degree of interest granted to them, be it for life, in tail, or in fee.

Copyholders too are said to be seised in fee simple. This application of the word "seised," and also of the words "fee simple," must be understood according to the subject.

In point of *quantity* of estate, and extent of interest, a copyholder may have a fee simple. In point of tenure, and the *quality* of his interest agreeable to the law of tenures, the custom has given stability to his estate; and he holds at the *will* of the lord, as that will is expressed by the custom of the manor.

Again, some say a copyholder is seised, others, that he is possessed. Either expression is equally proper. In point of *quantity* of estate, a copyholder is said to be *seised*; in point of *quality* of estate, as to tenure, he is said to be *possessed*.²⁶

(25) 9 Rep. 76 b.

(26) 1 Prest. Est. pp. 210 and 247.

16. The customs of a manor must be local,²⁷ immemorial, reasonable, uninterrupted, peaceably acquiesced in, certain and compulsory, or they cannot be supported; and if any part of a custom be bad, it avoids the whole. When a custom goes to the making and maintenance of a copyhold estate, it is to be taken favorably, but all customs in deprivation or bar of a copyholder's estate are to be construed strictly. The common law will prevail in collateral matters, where the custom is silent. The proof of a custom always lies upon him who insists upon it.

General doctrine of customs.

There are some customs, as those of borough-english and gavelkind, which *run with the land*; so that the lands cannot be discharged of them by fine, recovery, enfranchisement, escheat, or any other means than a positive act of Parliament.

Copyhold customs are of two kinds:—(1) general, extending to all manors and warranted by the common law, of which the courts take judicial notice; and, (2), particular, which prevail in some manors only, and must be pleaded specially, and construed strictly.

Coke lays it down that there are two pillars of customs:—one, common usage; the other, that it has been time out of mind.

17. The following kinds of property are demisable by copy of court roll, viz.:—a manor, lands or tenements within a manor, a mill, tithes, common appendant, common of pasture without land, a rent charge, a rent seck, underwood without the soil, herbage or vesture of land, forecrop or *prima tonsura*, advowson, fair, market and piscary.²⁸

What property is demisable by copy.

(27) It is contra-distinguished from a *prescription*, which is *personal*, and from the *common law*, which is *universal*. The usage of a certain *manor*, is a *custom*; a right alleged in a certain *person*, and his ancestors, or those whose estate he has, is a *prescription*, and the usage of the *whole realm* is the *common law*.

(28) See *Musgrave v. Cave*, Willes, 324; 1 Scriv. Cop. 104.

But rents, commons, or advowsons in gross cannot be granted, for they do not lie in tenure, nor are they appendant to any thing that lies in tenure.

Who incapable of being copyholders.

18. The following persons are incapable of taking as copyholders :—the Sovereign (for it would be beneath the dignity of the crown to perform base services), the wife of the lord of the manor (for husband and wife are one in legal estimation), an alien (for he cannot hold property in this country, excepting certain leaseholds by statute), and perhaps, corporations, either aggregate or sole²⁹ (for the grant ought to be confined to a person). With these exceptions, all individuals who are capable of enjoying property at the common law, can become copyholders.

(29) See the authorities quoted 1 Scriv. Cop. 108.

CHAPTER II.

THE QUALITIES AND INCIDENTS OF A COPYHOLD.

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| 1. Inheritable copyholds. | 9. Reliefs. |
| 2. Entailed copyholds. | 10. Heriots. |
| 3. Method of barring entails. | 11. Fines. |
| 4. Freebench. | 12. Estovers. |
| 5. Curtesy. | 13. Waste. |
| 6. Fealty. | 14. Limitation of copyholds. |
| 7. Suit of court. | 15. Right to trees and mines. |
| 8. Quit-rents. | |

The distinguishing qualities of copyholds are either incidental or collateral.

The incidental qualities are these:—

1. A copyholder, in legal contemplation, possesses in his copyhold an estate at will only; but, by custom, his copyhold may be descendible to his heirs. The descent of inheritable copyholds is guided by the maxims and canons of the common law and the statute 3 & 4 Wm. IV., c. 106.

2. The question whether copyholds can be entailed, like freeholds, which was formerly so much debated and contested, is now settled in the affirmative. It wholly depends, however, on the particular custom of the manor, and since custom must be immemorial, and, consequently, anterior to the Statute *De Donis*, which passed A.D. 1285, a *legal* estate tail in copyholds was known long prior to this act. But, lest there should be any doubt as to the existence of a custom authorizing *legal* entails, it will frequently be desirable to create an *equitable* estate tail in copyholds. This may be effected by originating a *trust*, when the custom of the manor will warrant a grant in fee. For whenever such grants in fee are allowed, the copy-

holds which may be so granted, may be entailed in effect ; if not by custom at law, they may be so in equity without it. For the custom only binds the tenancy, and has nothing to do with the trust. If a surrender be made to a person and his heirs, and a trust be declared of such estate to another, and the heirs of his body, a court of equity will see it observed. The trustee and his heirs are tenants to the lord, and the lord has nothing farther to do with it. The trust is between the tenant and the *cestui que use*, and solely the subject of equity interference.³⁰

Upon this subject Mr. Serjeant Scriven³¹ gives his opinion in the following words:—"The expedient suggested by Mr. Watkins, in order to execute an entail in *all* copyhold lands, has received the sanction of Mr. Gilbert Atherley, in his excellent treatise on Marriage Settlements (p. 564), but the author feels it a duty to suggest (though with every due respect for these authorities) that it ought not to be hastily adopted by any copyholder ; for he is unwilling to believe that a court of equity would sanction a device, the effect of which would be little short of assuming a power over the very existence of all established customs ; a power which no court of law would or could exercise ; indeed it would be virtually subjecting the customs of a manor, so far as they have for ages past regulated the descent and transmission of copyhold property within it, to the caprice of every copyholder ; the author must, at least, be allowed to doubt whether any gentleman at the bar would feel himself justified in recommending a title so circumstanced, and he would ask, should the case occur, how the equitable interest is to be barred ?"

Lord Hardwicke said, in *Pullen v. Middleton*,³² that the trust estate of a copyhold, could in no case be capable of

(30) Watkins's Copyholds, c. iv.

(31) Part 1, c. xi., § " Estates Tail," p. 68.

(32) 9 Mod. 463.

an entail, where the legal estate was not. Mr. Preston approved of and adopted the same opinion.³³

3. The mode of barring these customary entails is laid down by the 3 & 4 Wm. IV., c. 74, which abolished fines and recoveries, and introduced easier means of docketing these limited inheritances. Method of barring entails.

A tenant seised of a *legal* estate tail in copyhold, can only bar it by a surrender.³⁴ If the tenant in tail be a *feme covert*, the concurrence of her husband is rendered necessary. The consent of the person seised for an estate for life in possession (in the act called the protector of the settlement), is requisite for the purpose of barring any estates in remainder of the estates tail, and the consent may be given either by the surrender of disposition, or by a distinct deed.³⁵ For a disposition by the tenant in tail alone, as under a fine of freeholds, previously to the statute, would create a base fee only. A married woman protectress may consent as a *femē sole*.³⁶ The act contains a power to enlarge a base fee, in accordance with the power, prior to the act, for a tenant in tail of freeholds to do so, by suffering a recovery after having levied a fine.³⁷

The act also empowers *equitable* tenants in tail of copyholds to bar the entail, and dispose of their lands by surrender or deed.³⁸ A deed of disposition must be entered on the court rolls, but is not required to be inrolled in the Court of Chancery.³⁹

Mr. Serjeant Scriven, in his well-known work on Copyholds (pt. 1, c. ii. p. 61, n. o), submits that a surrender

(33) 1 Conv. pp. 153—160.

(34) Sections 40 and 50.

(35) Sections 42, 51, and 52.

(36) Section 45.

(37) Sections 19, 34, 35, and 39.

(38) Sections 50 and 53.

(39) Sections 53 and 54.

is preferable to a deed, when the object is merely to convert the equitable estate tail into an equitable fee simple, and that for carrying into effect a contract for the sale of copyholds, when the vendor is entitled to an equitable estate tail in possession, the proper form of conveyance is a bargain and sale, and a grant when he is entitled to an equitable estate tail in remainder. A tenant for life in possession, or protector, must give his consent by the same surrender or deed, or by a distinct deed, such deed also being required to be entered on the court rolls of the manor.

The 55th section of this act gives power to the commissioners acting in a petition of adjudication to bar and convey the estate tail of bankrupts for the benefit of the general body of creditors, to the same extent as the bankrupt himself would have possessed but for his bankruptcy.⁴⁰

The Bankrupt Law Consolidation Act, 12 & 13 Vict., c. 106, § 209, enacts, "that the court shall have power to sell, and by deed indented and enrolled in the courts of the manor or manors whereof the lands respectively may be holden, to convey for the benefit of the creditors any copyhold or customary lands, or any interest to which any bankrupt is entitled therein, and thereby to entitle or authorise any person or persons on behalf of the Court of Bankruptcy to surrender the same, for the purpose of any purchaser being admitted thereto."

Section 210 enacts, "that every person to whom any such conveyance of copyhold or customary lands or tenements, or of any such interest therein, shall be made, shall before he enter into or take any profit of the same, agree

(40) When the copyholds of a bankrupt were, under now abolished statutes, included in the transfer to the commissioners, it became necessary that the assignees should be admitted, and they were then subject to the fine; Lord Hardwicke (1 Atk. 95), therefore, recommended the copyholds of a bankrupt, to be excepted out of the assignment, as it would save two fines, as the commissioners may themselves convey to a purchaser. The Bankrupt Act, quoted in the text, now provides against this expence.

and compound with the lords of the manors of whom the same shall be holden for such fines, dues, and other services, as theretofore have been usually paid for the same, and thereupon the said lords shall, at the next or any subsequent court to be holden for the said manors, grant unto such vendee, upon request, the said copy or customary lands or tenements, for such estate or interest as shall have been so conveyed to him as aforesaid, reserving the ancient rents, customs and services, and shall admit him tenant of the same."

The collateral qualities of a copyhold are, that a wife is not entitled to dower out of, nor a husband to be tenant by the courtesy in, copyholds, unless such is warranted by special custom.

4. A widow's customary dower out of copyholds is called her freebench, which is regarded as an excrescence growing out of the husband's interest, and being indeed a continuance of his estate.

Freebench is equally applicable to the estate of the husband as to that of the widow; and anciently it was indiscriminately applied to the former, as well as to the latter, though, of later days, the estate of the husband is denominated his curtesy, while the term of freebench has been confined to the widow's estate. The etymology of the term, may be thus traced:—on the widow or husband acceding to the estate, at the death of the other, such widow or husband immediately becomes a tenant of the manor and enabled to sit on the homage as one of the *pares Curiae*, and hence called a *bencher*.⁴¹

(41) But though the term of *freebench* is now confined to *copyhold* property, yet it does not appear how the estate of a neif, or villein, could, with any propriety, be called *free*. Nor does it appear that the estate in dower of *freehold* property was ever denominated the widow's *freebench*; for as she held of the *heir*, she did not become *tenant to the lord*, nor, consequently, a

Since freebench is only claimable by special custom, the estate which a widow is to take, both as to its quantity, quality and duration, must be such as the custom prescribes. It is generally a third for her life, as at common law, but it is sometimes a fourth part only, and sometimes but a portion of the rent. In many manors, the wife takes the whole for her life, in others, she takes the inheritance. Frequently the customary right is *durante viduitate*, and in some cases it is confined to her chaste viduity, or widowhood. In the manors of East and West Emborne, and the manor of Chadleworth in Berkshire, the widow, if found guilty of incontinency, loses her freebench, unless she comes into court, riding backwards upon a black ram, repeating certain ridiculous words. The same custom prevails in the manor of Torre in Devon.

Freebench differs from dower at the common law, in that the former, unless the particular custom declares it to be otherwise,⁴² does not attach, even in right, till the actual decease of the husband; whereas the right to dower at the common law attaches immediately on marriage, and the widow is entitled to dower in lands of which the husband was seised *at any time during the coverture*. As the right of the wife to freebench does not attach till the husband's death, any alienation by him alone, to take effect in his lifetime, though without any concurrence of the wife, whether it be by surrender in court, by forfeiture, or in consequence of enfranchisement, the claim of the widow will

bencher of his court (as the widow of a copyholder did), except in the instance of her husband's dying without heir, when of necessity she must hold of the lord, and may sit in his court. And in this instance the term of freebench would be applicable to her estate; and perhaps to distinguish it from the dower or *bench estate* of lands of villein tenure, the term of freebench might have been originally appropriated to it; though at this day, by no very uncommon mutation, it is appropriated to a species of tenure which it could not, from the very nature of things, originally embrace. 2 Wat. Cop. 78.

(42) The dying seised is not essential to dower out of gavelkind land.

be effectually and utterly barred. And even if the husband make a lease for years, though by license of the lord, the widow shall not avoid it. But in this case, it must be remarked that her claim to freebench is not defeated by reason of the husband's *not* dying seized (though it should seem to be so urged in some of the books), as he would most indisputably die seized in the present instance, he being the copyholder, and not the lessee; and even the possession of the lessee being, at common law, the possession of the lessor; and, therefore it should seem, that the widow would not in this case be barred only *quoad* the lease, and consequently be entitled on its expiration. By special custom, however, the widow shall have her freebench, notwithstanding such lease, though without prejudice to it, she receiving the rent, &c. And if the husband contract for the sale of his copyhold, and die without any actual surrender, a court of equity will compel the widow to relinquish her freebench. *A fortiori*, if the husband actually surrender, and die before the admittance of the surrenderee, she shall be barred: for the subsequent admittance of the surrenderee, though after the death of the husband, shall relate to the time of the surrender, and so precede the title of the wife.

So if the husband become a bankrupt, and die after the execution of the bargain and sale by the commissioners, and before the admittance of the vendee, the widow of the bankrupt shall not be entitled to her freebench.

And as it is so repeatedly said, that the husband must die seised, at least by relation, in order to enable the widow to claim, it may be proper here to observe, that there can be no disseisin of a copyhold; and, consequently, though a person should enter with strong hand into the copyhold premises, yet the copyholder would continue tenant to the lord; and, by consequence, if the husband was, *before such entry*, seised of the premises,

he must, *notwithstanding such entry*, continue seized; and, consequently, such entry cannot defeat the title of the wife.⁴³

The Dower Act, 3 & 4 Wm. IV., c. 105, does not affect equitable copyholds, but only freeholds.

The widow of a purchaser or heir at law, who dies before admittance into his copyhold, is nevertheless dowable, since the admittance has reference back to the contract or ancestor's decease.

A jointure before marriage, in lieu of dower and thirds, out of any lands of freehold and inheritance, is a bar in equity to freebench, which is a customary right *nomine dotis*; so is a devise with the same intent.

When a widow is dowable by custom, she has all the incidental qualities of dower at common law. Since the wife's estate is a continuation of that of her husband, she holds of the lord, and is not in need of admittance, except by special custom, or, at least, it will be sufficient if she challenge her admittance. Admittance, however, is not dispensed with in gavelkind lands, or where the widow only takes a portion of the husband's copyhold lands, and then the heir must assign her freebench before her entry, and he can be compelled to do this by plaint in the nature of a writ of dower, duly levied in the manor court.

Curtesy.

5. Formerly the husband's estate in his wife's copyholds was termed his dower, equally with the widow's estate in her husband's lands. It was also termed dower by the curtesy. It is now mostly distinguished by the name of curtesy.⁴⁴

(43) 2 Wat. Cop. 82 *et seq.*

(44) The term of curtesy appears to have lost its original acceptance. The estate so denominated was considered by Littleton (§ 35) and others, as confined to this kingdom, and to exist here by a peculiar favour, or *curtesy*. The application of the term, therefore, in the latter acceptance, to the estate

Like freebench, curtesy depends upon special custom, which governs it in its quality and extent.

Mr. Watkins was of opinion,⁴⁵ that where the custom does not expressly require that there should be issue, the birth of issue is not essential to give the husband a title. Mr. Serjeant Scriven,⁴⁶ on the other hand, apprehends that when curtesy is allowed, if the custom be silent as to issue, the rule of the common law would prevail.

In cases where he is to take the whole, he may enter, &c., before any admittance; but in those in which he is to take a *portion* only, it seems evident that an assignment is as requisite as in those cases in which the widow takes a portion of her freebench.

But in order to entitle the husband to his curtesy, it should seem to be equally necessary that the wife should die seized, as it is that the husband should die seized in order to entitle the widow to her freebench. But as the wife is *sub potestate viri*, his title cannot, of consequence, be defeated or prevented by her alienation, as the widow may be prevented from claiming by the alienation of the husbands in his lifetime. A husband shall have his curtesy of a *trust*, though the widow shall, under the same circumstances, be precluded from claiming her freebench.⁴⁷

The incidents of a copyhold or the services due from the copyholder to the lord, by the established custom of

which the husband takes in copyhold property, must be most evidently absurd, as it is acknowledged that the husband shall not have his curtesy in copyholds, but by *special custom*. Now if he can only claim it by the custom of the particular manor, it is clear that he does not accede to it by the *curtesy of England*, since the curtesy of England is the common law of the land, and always distinguished from the usage of a particular place. But as it is apparent that the term *curtesy* is, in its ancient and proper sense, synonymous with that of *bench*, and only expressive of the right of the person entitled to it to sit in the lord's court, or *curtis*, as a homager or benchier, must be equally applicable to the one as to the other. 2 Wat. Cop. 80.

(45) 2 Cop. 103.

(46) 1 Cop. p. 80.

(47) 2 Wat. Cop. p. 103.

most manors, are fealty, suit of court, quit rents, reliefs, heriots and fines, and estovers.⁴⁸

Fealty.

6. Fealty⁴⁹ signifies the oath which was administered to every person upon his admittance to become a faithful tenant to the lord, and to do suit at his courts. It may be administered by the lord, or his steward. It cannot be done by attorney, or by an infant or guardian, neither can a husband perform it on behalf of his wife. It must be done personally. Joint-tenants must perform it jointly, and the eldest sister amongst coparceners.

The following is a form of the oath :—

“You shall swear that, as to the tenements to which you have been now admitted, you will be a true and faithful tenant to the lord of this manor. So help you God.”⁵⁰

The proper remedy for the neglect of the service of fealty, is distress.

It is not usual now-a-days to do homage, but it is

(48) Anciently it was usual for copyholders to perform corporal services, as to plough the lord's land so many days in the year, or to carry in his corn, or the like; and the remembrance of such services is still preserved in several manors of the kingdom. In many places the tenants still assemble with their teams, &c., on certain days, which are usually denominated *boon or due days*, but the ceremony is now chiefly formal. 1 Wat. Cop. c. ix., p. 194.

(49) In the days of barbarism and ferocity, when man estimated his right by his power, and regulated his honesty by the length of his sword; when nation supplanted nation in its possessions, and clan invaded clan without compunction or shame; when glory was attached to rapine and desolation, and each mighty chieftain prided himself on being the greater thief; the chieftain was naturally jealous of his neighbours. He was conscious that if his arm was against every man, every man's arm would be against him. Settled among the injured inhabitants of a country whom he had plundered and distressed, he was careful of his own strength. But he was not only apprehensive of the vengeance of the oppressed, he was equally jealous of his fellow lords. Hence he bound his followers, by oath, to be true to his person, and exacted the most solemn promises of fidelity from him who was about to be admitted into the tenancy. A tenant strictly at will was not to swear fealty, as the lord might remove him at pleasure. A copyholder, however, not being considered as a tenant strictly at will, but as irremovable while he performed his services, was, in pursuance of custom, duly sworn. 1 Wat. Cop. p. 413.

(50) 1 Wat. 415.

respited, and entered on the rolls as such. It is now useless, for the tenure is sufficiently evinced by enrolling the admittance.

7. Every copyholder (except perhaps the lessee of a Suit of court. copyholder, for he is not a customary tenant), is bound to attend (for otherwise it would be impossible for the lord to hold a copyhold court), the lord's court, and to do service as a homager. A husband performs this service on behalf of his wife. A corporation cannot do suit, for it can only appear by attorney, and an attorney cannot do suit in a customary court.

If the copyholder do not appear on a personal summons, or be duly essoigned, *i. e.*, having his non-appearance justified, by alleging some excuse, as that he is ill, &c., he shall forfeit his copyhold, or the lord may distrain upon him, but the distress cannot be sold, for it is deemed as merely a pledge to compel the performance of the services, or he may be amerced for non-attendance, but the amercement must be affeered, *i. e.*, ascertained by at least two of the other copyholders; it is recoverable by an action of debt, unless the custom warrants a distress.⁵¹ A distress or an amercement is a dispensation of the forfeiture.

8. A rent of assize is the ancient term for the small Quit-rents. reservation on the original grants of freehold and copyhold lands, where the rents were assized, *i. e.*, reduced to a certainty by the lord, this was sometimes made in money, and at others, in pepper cummins, or the like; the former being usually paid in silver, was called white rent, and the latter was called black rent. The payments are now usually denominated quit rents, but this term, strictly speaking, is applicable only to a rent reserved in lieu of all services, because, then the tenant in respect of it is quit from other services. Those paid by freeholders are frequently

(51) *Rowlston v. Alban*, Cro. Eliz. 742.

denoted chief rents. It is essential to the title of these rents that they should have been paid immemorially, and without variation.

The lord may distrain for this rent as of common right, and also under 4 Geo. II., c. 28, § 5.

Reliefs.

9. Reliefs are payable by copyholders in pursuance of a special custom. They are of two kinds: (1.) By service paid on death; (2.) By custom paid on death or alienation according to the custom; this latter, however, is rather an alienation fine.

The remedy for a proper relief, is by distress; but, for an improper or prescriptive relief, an action of debt.

Heriots.

10. The heriot⁵² was originally a tribute to the lord of the horse or habiliments of the deceased tenants, in order that the *militiæ apparatus* might continue to be used for the purpose of national defence by each succeeding tenant. On the decline of the military tenures, the heriot was commuted for a money payment, or for the tenants best live or dead chattel.⁵³

(52) The word is supposed by some to be derived from *here* (Sax.), an army, and *geat*, provision. Willis, 194. Coke derives it from *here*, lord, and *geat*, beste, i.e., the lord's beste. Co. Litt. 185 b.

(53) That system which we generally denominate the feudal, while it anxiously provided for the liberty of the individual, was admirably calculated for national defence. Each freeman was a soldier, and was obliged to render to his country his services in war. He was to be provided with arms, according to the usage of the times and the rank which he bore, not only for personal, but for national safety. In these arms the society was interested, and, when the tenant died, they devolved to his superior, to his immediate lord, that they might continue to be used in the defence of the state; and hence the origin of the heriot. We find the heriot either expressly noticed or alluded to in most of the Gothic codes, and from the northern nations have we also derived the term. As the feudal system declined, the heriot was frequently commuted; and the lord received a sum of money instead of a portion of arms, horses or habiliments of war. Such was the usage of Normandy before the conquest of England, and although William ordained the rendering of arms, yet we find the payment in money usual in the time of Henry the Second, and required in that of John. The heriot

Heriots are divided into (1.) Heriot service, and (2.) Heriot custom.⁵⁴

Heriot service is an express reservation by the lord in the original grant, claimable by prescription. It arises from ancient tenure, in the nature of a rent, and lies in *render* as well as in *prender*; it is recoverable by distress. The heriot service being due by reservation, goes with the reversion to the heir or grantee, and follows the seigniorship if the grant be in fee. It is said to be due upon the death of the tenant in fee-simple only, but Mr. Serjeant Scriven⁵⁵ thinks that this heriot may be reserved on a lease

was often confounded with the relief, though, in fact, they differed essentially. The heriot was paid on the determination of the tenancy; the relief on the accession of the heir. From analogy to the proper or military heriot, was the heriot of the villein or husbandman demanded. In the case, indeed, of an absolute or pure villein, as his lord was, in strictness, the owner or proprietor of his chattels, the heriot, when taken, was, in truth, an indulgence, as it amounted to a relinquishment by the lord of the rest of the property. As the military tenant was to render his warlike accoutrements, so the husbandman, or socage tenant, was to render his best beast. The former were necessary for the continuance of the national defence, and the latter was to be used for the purpose of agriculture. The villein-heriot, however, differed in different manors, as it depended upon reservation, or some agreement, which afterwards ripened into custom.

We are told by Bracton, Fleta, and Britton (who, by the way, scarcely differ in their description), that the heriot was originally a voluntary or gratuitous bequest of the tenant. But I apprehend that this must be understood merely of the heriot of the husbandman, and not of the military heriot, since we find the latter fixed as a right, as a legal duty, at least so early as the time of Canute the Great, confirmed in that of the Conqueror, and acknowledged in the charters of Henry the First, John, and Henry the Third. In some Saxon wills, indeed, we find express bequests of an heriot to the lord; but such instances seem only from abundant caution, that the testators might not appear unmindful of their lord, and so prevent the chattels of the deceased from passing into other hands, and especially into those of the church; since it is evident, from the very bequests referred to, that, though the heriot was expressly directed to be paid, it was considered as the lord's "right." 2 Wat. Cop. p. 36. 1 Scri. Cop. 369.

(54) There is a third kind, called *Suit-Heriot*, reserved on a grant of freehold lands.

(55) 1 Cop. 372, and the cases there quoted.

for life, and on the death of every particular tenant, whether for life or years, or even at will.

Heriot custom is due by virtue of an immemorial usage from every tenant of the particular manor, more frequently upon the lord's tenant's death, but sometimes on alienation also, or on alienation only. A heriot on alienation is in the nature of a fine. It lies in *prender* only, therefore the lord cannot distrain for it, except, perhaps, by special custom. A heriot is not due on the death of a person having only an *interesse termini*. It will be due on the death of the surrenderor of copyholds, if he die before the surrenderee's admission, the latter not becoming the lord's tenant until admittance. A heriot is due only on the death of the survivor of joint tenants, for it is payable on the death of a person who dies solely seised, and such is the rule respecting coparceners. Tenants in common being solely seised, a heriot is due to the lord on the death of each of them. When a female copyholder marries, the husband and wife are seised in her right, and the seisin continues in the wife, if she survive; and as there is no change of tenancy on the husband's death, no heriot will accrue to the lord. Heriots are due on the death of tenants by the curtesy and in freebench, and when a widow has her freebench of a portion of the land, a heriot will be due on the death of both the heir and widow. The heriot is due in respect of the land, so that when a person dies seised of several heriotable tenements, a heriot must be paid for each, unless a special custom exist to the contrary. The death of a bankrupt copyholder, after assignees are chosen, will not entitle the lord to a heriot.

The lord should seize immediately after the heriot accrues, as his right would be concluded by a *bonâ fide* and legal sale by the executors in market overt, by which the property in any goods so sold is effectually transferred. The lord's claim cannot be defeated by a will or gift.⁵⁶ If

a seizure cannot be effected, an action of trover or detinue is the remedy.

If the tenant have no beast for a heriot, the lord is defeated; but a bill in equity lies to discover the best beast of a tenant.⁵⁷

If the lord seize when no heriot is due, the remedy against him is replevin, trover, or trespass.

11. A fine⁵⁸ is a sum of money payable by custom to Fines. the lord. There are three classes of fines:—(1.) Those due on the change of the lord; (2.) Those on the change of the tenant; and, (3.) Those for a licence to empower the tenant to do certain acts.

When the fine is due on the change of the lord, such change must be by the act of God, and not in consequence of any act of the party. It can therefore be only claimed on the death of the lord.

When the fine is due on the change of the tenant, it matters not whether that change is effected by the act of God, or by the tenant's own act. Whenever the tenancy is changed, there a fine is payable. Should the tenant be compelled to pay a fine by reason of any act of the lord, he would be subject to much oppression; but where it is the consequence of his own act, he is left to his own discretion.

Those fines which are due on licenses by the lord, to empower the tenant to do certain acts, as to demise, &c.,⁵⁹ are rare. There must be a special custom to support such fine, for, by general custom, fines are due only on admissions.

12. Every copyholder is entitled to estovers, as of com- Estovers.

(57) *Trinity College v. Brown*, 1 Vern. 441.

(58) The fine is preserved by 12 Car. 2, c. 24, § 6.

(59) 1 Wat. Cop. 441, *et seq.*

mon right, and as incident to his estate, unless prohibited by a special custom.

Waste. 13. A copyholder for life is punishable for permissive waste.⁶⁰

Limitation of copyholds. 14. Although copyholds are not within the operation of the Statute of Uses, yet, upon the surrender of a copyhold estate to L., to the use of T., in trust for S., the legal estate will remain in T., according to the express words of the surrender, and S. will take the equitable and beneficial interest; for copyholds are subject to trusts.

Copyholds, says Watkins,⁶¹ are equally subject to trusts as freeholds, but they are not within the Statute of Uses. The person having the legal estate is tenant to the lord; the trust, therefore, may be created, modelled, transferred or destroyed, without his concurrence.

The Trustee Act (1850), 13 & 14 Vict., c. 60, § 28, enacts “that whensoever, under any of the provisions of this act, an order shall be made, either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, any such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly, and whenever, under any of the provisions of this act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments

(60) 1 Cruise's Dig. tit. x., c. 3, § 15.

(61) 1 Cop. p. 322.

so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.”

A person seised of an estate by copy, may surrender it to the use of as many persons, successively, by way of remainder, as he pleases, so that the several portions of the estate so limited exceed not his own interest in the premises; as, if he have an estate in fee, he may surrender to the use of A. for life, with remainder to B. and the heirs of his body, with remainder to C. in fee.⁶²

15. A copyholder has a possessory interest in the trees Right to trees and mines. on the land, but he cannot cut them down, except with the lord's consent, neither can the lord, except with the tenant's consent, unless there exist an immemorial usage to the contrary,⁶³ which must be most strictly observed. When timber trees on copyhold land are separated from the soil, by any means soever, the tenant's possessory right in them ends, and the lord may take them. But as to pollards, dotards, bushes and the like, if they are thrown down, they belong to the tenant. And when the copyholder may cut timber for repairs, he may sell the lops, tops and bark, towards defraying the charges of reparation. It is generally considered that the right to estovers is incident to the grant of every copyhold house, seeing that the tenant is bound to keep it in repair. Should there be no house, then the right to estovers must arise by special custom.⁶⁴

(62) 1 Wat. Cop. c. 5.

(63) 1 Serv. Cop., pt. 1, c. xii.

(64) *Ibid.* p. 424.

A copyholder, whether of inheritance or not, has the same possessory interest in mines as he possesses in trees, the general rule being, that he who has possession of the soil has also possession of the subsoil,⁶⁵ and a proprietary right in them may arise to the tenant by immemorial custom ; but otherwise the property in mines belongs to the lord of the manor. A copyholder of inheritance cannot, without a special custom, dig for mines, neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the estate.⁶⁶

Mr. Serjeant Scriven apprehends (1 Cop. 433), that there is no distinction between a mine and a quarry, but that the lord and tenant must concur for the purpose of justifying either of them in opening and working a quarry of stone, slate, &c.

(65) *Lewis v. Branthwaite*, 2 B. & A. 437, particularly Lord Tenterden's observations.

(66) *Gilbert's Tenures*, 327.

CHAPTER III.

SURRENDERS AND ADMITTANCES, VOLUNTARY GRANTS,
WILLS AND PARTITION.

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| 1. A surrender described.
2. How and by whom made.
3. Effect of it.
4. Forms of surrenders and deeds of covenants :—
(1) On the purchase of a mortgaged copyhold.
(2) A deed of covenants to the above surrender.
(3) On the purchase of mortgaged copyholds from trustees by devise in trust to sell.
(4) A deed of covenants to the above.
5. Mortgage, with two forms.
(5) A surrender by way of mortgage. | (6) A deed of covenants to accompany the above surrender.
6. Equitable copyholds transferred by assignment.
7. Presentment abolished.
8. Admittance defined.
9. How compelled.
10. The lord's fine on admittance.
11. The steward's fees.
12. Voluntary grants.
13. Wills, and the provisions of 1 Vict., c. 26.
14. Copyholds not within the Registry Acts.
15. Partition. |
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1. THE proper and ordinary mode by which a copyholder transfers his legal customary estate to another, is by surrender (which is *vocabulum artis*) to the lord of the manor, who completes the conveyance by the admittance of the new tenant. The lord is simply a conduit pipe of assurance. As a general rule, copyholds are not alienable by any of the ordinary common law assurances.

Mr. Watkins prefaces his remarks on the subject of surrenders by the following apposite observations :

“ A copyholder being, in consideration of law, but a tenant at will, he had no interest which he could transfer to another ; he could only relinquish his own right to the premises. When he was, therefore, desirous that another should succeed him in the tenancy, he surrendered or returned the possession to the lord, under confidence that he would regrant the premises to the person he himself should designate. If the lord accepted such resignation under such confidence, the Court of Chancery enforced the trust. This power, thus assumed by the courts of equity, seems coeval with the introduction of uses with respect to free-

A surrender described.

holds. Though seemingly new in the time of Edward the Fourth, it was generally acquiesced in, as it opened the way for the alienation of copyhold as well as freehold estates, and the connection between the lord and tenant every day relaxing, and the returns and duties becoming more certain and fixed, the law countenanced the usage. The mode, indeed, is now considered as a form, but even as a form it is, generally speaking, indispensable. A copyhold cannot properly be transferred by any other assurance; no feoffment or grant will have that operation. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law, but we must surrender to each other's use, and the lord will admit us accordingly. The power of alienation in the copyholder is now, however, so established, that the lord is compellable, not only by *subpaena* in equity, but by *mandamus* at law, to admit the person nominated by the former tenant.⁶⁷

A surrender, then, is the yielding up of a legal tenancy, either by express words or operation of law, by the tenant after admittance, or his lawfully appointed attorney,⁶⁸ either in or out of court, to the lord of the manor in person, his chief steward or under-steward, or, by special custom, to the bailiff, beadle or reeve, or to certain tenants of the manor, either as a relinquishment or resignation of such estate, or as the medium of conveying or transferring it to another.

How and by
whom made.

2. Surrenders are made in various forms; in some manors by a rod, in others by a straw, in others by a glove, which symbol is delivered over by the surrenderor to the steward or other person taking the surrender in the name of seisin.

(67) 1 Wat. Cop. p. 80, *et seq.*

(68) The steward should enrol the power of attorney, which should be copied *verbatim* at the end of the court roll of the particular day; 1 Scriv. Cop. 127. A person who has a bare authority, as an executor empowered to sell land, cannot surrender by attorney; Co. Cop. § 34.

A surrender by a *feme* copyholder is suspended by marriage, but a mere naked power, or a power of nomination, given to a *feme* copyholder, who afterwards marries, may be exercised by her during her coverture. A surrender by a *feme covert* is void, unless she signify her free will and assent under a private examination by the lord, his steward or deputy, according to the custom, and her husband join in the transaction, but his assent will, in many cases, be presumed.

Though copyholds are not, as we have already said, within the Statute of Uses, they may be surrendered by a husband to the use of his wife, the conveyance not being immediately to her, but mediately, by the lord into whose hand the surrender is made.

An infant is not bound by a surrender except by special custom, yet a surrender by an infant, if it be for his benefit, or (if not prejudicial to the infant) for the benefit of others, is voidable only, and not *ipso facto* void; it may be confirmed by the infant on his attaining majority.

A person, not in the customary seisin, as a contingent remainder-man, or the heir in his ancestor's lifetime, even though the ancestor should surrender (which simply passes the interest which the surrenderor possesses at the time of making it), is not affected by the doctrine of estoppel, which does not apply to copyholds.⁶⁹ But reversioners and vested remainder-men may surrender, for they are in the customary legal seisin. One joint-tenant may release or surrender to another, which will operate as a severance of the joint tenancy.

Two or more distinct copyhold estates may be included in one surrender, although they are held under distinct titles; thus coparceners and tenants in common may elect to pass their several interests to a purchaser or mortgagee by one surrender.

(69) *Goodtitle d. Faulkner and others v. Morse*, 3 T. R. 365.

Effect of it.

3. When a copyholder surrenders for a valuable consideration, the land is bound both at law and in equity, and he is prevented from surrendering to any other person; but the whole legal estate remains in him, and he has a right to retain the possession, subject to his accounting for the mesne profits, should the surrenderee be afterwards admitted; and if the surrenderor die, the estate devolves upon his customary heir, but he is a trustee for the surrenderee.

A surrender is unaffected by the death of any of the parties to it, and the transfer may, notwithstanding, be completed.

A copyholder for life, who, by special custom, surrenders to another, places the surrenderee in by the surrenderor, as in the case of an inheritable copyhold, and not by the lord; but in the absence of any such special custom, where a copyholder for life surrenders to the lord, whether absolutely to do therewith his will and pleasure, or to the use of another, to whom the lord grants the copyhold, the estate vests in the lord, and the grantee is in by him, and not by the surrenderor.

A conveyance of copyholds for a consideration, however inadequate, is not fraudulent as against creditors, under 13 Eliz., c. 5.

Surrenders of copyholds are governed by the same rules as common law conveyances; but a surrender will be good although the surrenderee is not accurately described, and an uncertainty in a surrender may be helped by averment; but when it is so very general and uncertain as not to disclose the intention, it will necessarily be deemed void;⁷⁰ particular customs materially influence the construction of the language used in copyhold surrenders. A surrender of copyholds is not allowed to work a wrong: it passes only such estate as the surrenderor may lawfully

(70) 5 Co. 68 b; Co. Cop. § 35, Tr. 80.

convey. A voluntary surrender, made out of court, may be revoked at any time before admittance, for copyholds are within 27 Eliz., c. 4.

An error in the entry of a surrender upon the rolls, will be amended on clear proof of it.

4. We will now introduce some precedents, which have been actually adopted, in order to show how the theory of surrenders is carried into practice.

(I.)

*SURRENDER of a COPYHOLD ESTATE to a PURCHASER
by a MORTGAGOR and his WIFE, his MORTGAGEE
joining on being paid off.*

MANOR of —, in } Be it remembered, that on the — day of
the county of —. } —, in the year of our Lord —, in consi-
deration of the sum of —*l.* of lawful money of Great Britain, by A. B.,
of —, in the county of —, unto C. D., of —, within — aforesaid
—, in hand at or immediately before the signing and passing of this sur-
render, well and truly paid, at the request and by the direction of E. F., of
—, in the said county of —, the receipt of which said sum of —*l.*,
in full satisfaction and discharge of all monies due and owing unto the said
C. D. by the said E. F., for principal, interest or otherwise howsoever, upon
or by virtue of a certain mortgage surrender of the lands and hereditaments
hereinafter described, bearing date the — day of —, A.D. —, and
made and passed by G. H., of — aforesaid —, and by the said E. F. for
securing unto the said C. D., his executors, administrators and assigns, the
principal sum of —*l.*, and the interest thereof, and in pursuance of which
surrender the said C. D. was duly admitted tenant of the lands and heredita-
ments comprised therein, at a court held for the said manor, on the —
day of —, A.D. —, He the said C. D. doth hereby admit and acknow-
ledge, and from the same and every part thereof, doth acquit, release and
discharge the said E. F. and A. B. respectively, and their respective heirs,
executors, administrators and assigns, and also the said mortgaged lands
and hereditaments, for ever by these presents;

And also in consideration of the sum of —*l.* of the like lawful money
by the said A. B. unto the said E. F., in hand at the same time likewise
well and truly paid, the receipt of which said sum of —*l.* as well as the
payment unto the said C. D. of the aforesaid sum of —*l.*, and that the

Money paid
to the mort-
gagor by the
vendee.

Money paid
to the mort-
gagor-vendor
by the
vendee

same two several sums (making together —*l.*) are the full consideration money or price for the absolute purchase of the messuage and tenements, buildings, lands, hereditaments and premises, hereinafter particularly described, and intended to be hereby surrendered, and of the inheritance thereof in possession, and free from all incumbrances, he the said E. F. doth hereby admit and acknowledge, and of and from the same respective sums, and every part thereof, doth acquit, release and discharge the said A. B., his heirs, executors and administrators, and also the said lands and hereditaments, for ever by these presents ;

Operative words surrendering to the lord.

He the said C. D. (at the request and by the direction of the said E. F., testified by his signing and passing this surrender), and also the said E. F. and M., his wife, **HAVE**, and each and every of them **HATH** surrendered and given up, and by these presents **DO**, and each and every of them **DOTH** surrender and give up into the hands of the lord of the said manor by a rod, and by the hands and acceptance of —, steward of the courts of the said manor, and according to the custom thereof (the said M. having previous to her passing of this surrender been separately and apart from her husband, examined by the said steward, and confessed that she was not constrained by her said husband, but freely and voluntarily gave up) ;

Separate examination of the wife.

The parcels.

All that messuage or tenement, with the appurtenances, commonly called or known by the name of the —, Together with the outbuildings and the several closes of land thereto belonging, or usually occupied or enjoyed therewith, commonly called or known by the several names of the —, —, —, all which said premises are situate in —, in the manor of — aforesaid, and contain altogether in customary measure —*a. —r. —p.*, and were formerly in the occupation of —, afterwards of —, and his under-tenants, and are now in the tenure or occupation of the said — and of his under-tenants, and of the yearly rent to the lord of the said manor of — :

And also all those four cottages or dwelling-houses, situate at —, in — aforesaid, formerly erected and now standing upon some part of the said — :

General words.

And all and singular houses, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, ways, passages, hedges, fences, ditches, trees, woods, underwoods, waters, watercourses, common right, easements, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said messuage or tenement, buildings, lands and hereditaments, or any of them, belonging or in anywise appertaining, or usually held, occupied, or enjoyed therewith ;

And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof ;

And all the estate, right, title, interest, inheritance, use, trust, possession, property, claim and demand whatsoever, at law or in equity, of each and every of them, the said C. D., E. F. and M. his wife, of, in, and to the same hereditaments and premises, and every part thereof ;

To the use and behoof of the said A. B., his heirs and assigns for ever, For the vendee's use. by the rents, suits and services therefor due, and of right accustomed, according to the custom of the said manor, yielding and paying such rents, suits and services.

Signed by the said —, —, —, in my presence, and by — surrendered into my hands,

X. Y.

{ A customary tenant of the said manor,

In the presence of —.

(N.B.—The receipts for the two sums of money should be added.)

(II.)

The DEED of COVENANTS to accompany the above SURRENDER.

This Indenture, made the — day of —, in the year of our Lord —, Between E. F., of —, in the county of —, of the one part, and A. B., of —, in the same county of —, of the other part. Date and parties.

Whereas by a surrender, bearing date the — day of — A.D. —, and signed and passed according to the custom of the manor of —, in the said county of —, for the considerations therein expressed, G. H., of — aforesaid —, the then owner of the lands and hereditaments hereinafter described, by the direction of the said E. F., and also the said E. F., surrendered into the hands of the lord of the said manor, according to the custom thereof, All that messuage or tenement with the appurtenances, commonly called or known by the name of the —, together with the outbuildings, and the several closes of land thereto belonging or usually occupied or enjoyed therewith, commonly called or known by the several names of the —, —, —, all which said premises are mentioned to be situate in —, in the manor of — aforesaid, and to contain altogether in customary measure,—a,—r,—p,—and to have been then late in the occupation of —, but to be then in that of —, and his under-tenants, and of the yearly rent to the lord of the said manor of — : And also all those four cottages or dwelling-houses situate at —, in — aforesaid, and all other the hereditaments and premises (if any) mentioned, and intended to be surrendered to the said G. H., by surrender dated the — day of —, A.D. The surrender by way of mortgage recited.

—, with the appurtenances, to the use of C. D. of —, within — aforesaid —, his heirs and assigns for ever, as a security for and subject to redemption on payment by the said E. F., his heirs, executors, administrators or assigns, unto the said C. D., his executors, administrators or assigns, of the principle sum of —*l.*, and the interest thereof, at the expiration of six calendar months from the date of the surrender now in recital, but in which payment default was made;

Recital of the
admittance
in pursuance
of the afore-
said surren-
der.

Recital of
the purchase
contract.

And whereas the said C. D. was duly admitted tenant in pursuance of the said surrender, at a court held for the said manor on the — day of —, A.D. —.

And whereas the said A. B. lately contracted with the said E. F., for the absolute purchase of the said copyhold messuage or tenement, buildings, lands and hereditaments, comprised in the surrender hereinbefore in part recited, and the inheritance thereof, in possession, and free from incumbrances, at the price of —*l.*, which sum hath immediately before the execution of these presents, been duly paid by the said A. B. unto the said C. D. and E. F., in the several sums and proportions following, that is to say, unto the said C. D., in full satisfaction and discharge of all moneys due and owing to him, for principal interest or otherwise howsoever, upon the security of the hereinbefore in part recited mortgage surrender, the sum of —*l.*, part of the said purchase price of —*l.*, and to the said E. F. the sum of —*l.*, residue of the same sum, and the payment and receipt of which several sums, the said E. F. doth by these presents acknowledge, and therefrom doth release and discharge the said A. B., his heirs, executors, administrators and assigns;

Recital of
surrender by
mortgagor
and mortga-
gee to the
purchaser.

And whereas for carrying into effect the said purchase contract, the said C. D., in consideration of the sum of —*l.* paid to him by the said A. B. as aforesaid, and the said E. F., in consideration of the sum of —*l.* paid to him by the said A. B., as hereinbefore is mentioned, and also M. the wife of the said E. F., have this day severally surrendered out of court, into the hands of the lord of the said manor, by a rod and by the hands and acceptance of —, steward of the courts of the said manor, and according to the custom thereof: **All** that and those the aforesaid messuage or tenement, closes of land, hereditaments and premises, and also all those the aforesaid four cottages or dwelling-houses in the surrender in part hereinbefore recited, particularly mentioned and described, all which said messuage or tenement, land and hereditaments, are now or were lately in the holding or occupation of — or his under-tenants, and the same are for greater certainty delineated and described upon the map or ground-plan thereof hereupon endorsed, and are upon such plan surrounded by lines coloured; **Together** with all and singular the rights, members and appurtenances, to the same premises respectively belonging or appertaining, To the use of the

said A. B., his heirs and assigns for ever, according to the custom of the said manor, at and under the rents, suits, and services therefor due and of right accustomed;

And whereas on the treaty for the said purchase, it was agreed that the said E. F. should enter into the covenants hereinafter contained for the title, quiet enjoyment, freedom from incumbrances, and further assurance of the hereditaments so surrendered as aforesaid;

Agreement
to covenant
for title.

Now this Indenture witnesseth, that in pursuance of the said agreement, and in consideration of the premises, He the said E. F., for himself, his heirs, executors and administrators, doth hereby covenant and agree with and to the said A. B., his heirs or assigns, in manner following, that is to say:

Testatum.

That for and notwithstanding any act, deed, matter or thing whatsoever, by the said E. F. and C. D., or either of them, or any person or persons whomsoever claiming under or in trust for them, or either of them, done, committed or willingly suffered to the contrary, they the said E. F. and M. his wife, and C. D. at the time of the surrendering the said copyhold hereditaments and premises as aforesaid, or some or one of them, had in themselves or himself and herself, good right and full power and authority to surrender the same, with the appurtenances, unto and to the use of the said A. B., his heirs and assigns for ever, according to the true intent and meaning of the lastly above recited surrender;

Covenants :
Good right to
surrender;

And also that he the said A. B., and his heirs and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly hold and enjoy all and singular the said messuage or tenement, buildings, lands, hereditaments and premises, so surrendered as aforesaid, with their appurtenances, and receive and take the rents, issues and profits thereof, and of every part thereof, for his and their own use and benefit, without any eviction, interruption, or denial of or by the said E. F. and C. D. respectively, and their respective heirs or assigns, or any person or persons whomsoever, having or claiming any estate, trust or interest, in, to, or out of the same premises, or any of them, by, from or under them, or either or any of them;

quiet
enjoyment;

And that free and clear, and freely and absolutely acquitted, exonerated, and discharged, or otherwise by the said E. F., his heirs, executors and administrators, well and sufficiently kept harmless and indemnified from and against all and all manner of former and other estates, rights, titles, charges and incumbrances whatsoever, made, created, occasioned or suffered by the said E. F., or his heirs, or by, through or with his, their or any of their acts, procurement, privity or default;

freedom from
incumbran-
ces;

And moreover that he the said E. F., and also the said C. D. and their respective heirs, and every other person whosoever, having or rightfully

further as
surance.

claiming any estate, trust or interest, at law or in equity, in, to, or out of the said messuage or tenement, buildings, lands, hereditaments and premises, so surrendered as aforesaid, or any part thereof, by, from, or under the said E. F. and C. D. respectively, and their respective heirs, shall and will from time to time, and at all times hereafter, upon the request and at the costs and charges of the said A. B., his heirs or assigns, make, do, acknowledge, sign, pass and execute, and cause or procure to be made, done, acknowledged, signed, passed and executed, all such further and other lawful and reasonable acts, devices, surrenders and assurances in the law for more perfectly and absolutely conveying, surrendering, and assuring all and singular the said messuage or tenement, buildings, lands, hereditaments and premises, so surrendered as aforesaid, with their appurtenances, unto and to the use of the said A. B., his heirs and assigns, or otherwise as he or they shall direct, as by the said A. B., his heirs or assigns, or his, their, or any of their counsel shall be devised or advised and required, so as the person or persons who shall be required to make, sign, pass and execute the same, be not compelled or compellable to go from home for that purpose. *In witness, &c.*

(III.)

The next two precedents effect a sale of mortgaged premises by the trustees under the will of the deceased mortgagor.

THE SURRENDER.

MANOR of —, in the county of —.

Recitals:
that a surrender and deed of settlement as to the premises firstly described, were made in favour of the deceased mortgagor

Whereas by virtue of a surrender or memorandum in writing, duly signed and passed according to the custom of the manor of —, in the county of —, and bearing date the — day of —, A.D. —, and of the admittance granted in pursuance thereof at a court held for the said manor, on the — day of — following, E. F. of —, in the said county of —, and Z. T. of —, in the same county — (who is since deceased), became fined and seized to them, their heirs and assigns for ever, according to the custom of the said manor, of and in the several customary or copyhold messuages or tenements, farms, lands, hereditaments and estates, firstly hereinafter described, and intended to be surrendered, with their appurtenances, nevertheless to the uses, upon the trusts, and for the intents and purposes limited and declared concerning the same by an indenture or deed of settlement, bearing date the — day of —, A.D. —, more particularly referred unto in the said surrender, being uses or trusts to or in favour of K. L. of —, in the said county of —, and his assigns for his life, with remain-

der, To the use and intent that S. L., the wife of the said K. L., might take thereout, after his decease, the jointure, rent-charge, or annual sum of ——l. for her life, in such manner, and with such powers and remedies for the recovery thereof when in arrear, as therein mentioned, and subject thereto, to or in favour of the said K. L., his heirs and assigns for ever.

And whereas by a surrender, bearing date the —— day of ——, the said K. L., in consideration of ——l., advanced and paid to him by A. B. and C. D., both of —— in the said county of ——, surrendered all and singular the same messuages or tenements, farms, lands, hereditaments and premises, with their appurtenances, to the use of the said A. B. and C. D., their heirs and assigns for ever, according to the custom of the said manor, as a security for, and subject to redemption, upon payment by the said K. L., his heirs, executors, administrators or assigns, unto the said A. B. and C. D., their executors, administrators or assigns, of the said principal sum of ——l., together with interest thereon after the rate therein mentioned, on the —— day of —— next following the date of the now reciting surrender, but in which payment default was made.

That he mortgaged the above premises, and made default;

And whereas the said A. B. and C. D. were admitted, in pursuance of the said surrender, at a court holden for the said manor on the —— day of ——.

That the mortgagees were admitted;

And whereas by a surrender in writing, bearing date the —— day of ——, also duly signed and passed according to the custom of the said manor, the said K. L. (who was then fined and seised for an absolute estate of inheritance in possession, of and in the several copyhold messuages or tenements, farms, lands, hereditaments and estates secondly hereinafter described and intended to be surrendered) in consideration of ——l. paid and advanced to him by the said A. B. and C. D., and for securing the same, surrendered all and singular the same several secondly described hereditaments and premises, with their appurtenances, to the use of the said A. B. and C. D., their heirs and assigns for ever, according to the custom of the said manor; Subject nevertheless to a proviso or condition for redemption of the said premises on payment by the said K. L., his heirs, executors or administrators, unto the said A. B. and C. D., their executors, administrators or assigns, of the principal sum of ——l. with interest for the same after the rate therein mentioned, together with certain incidental expenses therein referred to, on the —— day of ——, succeeding the date of the now reciting surrender, and at a court held for the said manor on the day of the date of such surrender, the said A. B. and C. D. were duly admitted tenants of the said last mentioned copyhold hereditaments in pursuance thereof.

That he also mortgaged the premises secondly described to the same mortgagees, and that they were duly admitted;

And whereas default was made in payment by the said K. L. of the

That he made default in

the repayment of this second mortgage, and effected a further charge upon the same premises in favour of the same mortgagees.

That he further charged the same premises to the same mortgagees, and mortgaged certain freeholds by way of further security.

That he also mortgaged the premises thirdly described to a different mortgagee.

That this mortgagee

principal and interest and other monies secured by the said last mentioned surrender on the day thereby limited and appointed for that purpose, and by an indenture bearing date the — day of —, and made or expressed to be made between the said K. L. of the one part, and the said A. B. and C. D. of the other part, the said K. L. further charged the said copyhold lands and hereditaments comprised in the said lastly hereinbefore in part recited surrender with payment unto the said A. B. and C. D., their executors, administrators or assigns, of the principal sum of —l. then advanced and lent by them unto the said K. L., and the interest thereof, in addition to the several principal and interest-monies owing and secured upon or by virtue of the said last-mentioned surrender.

And whereas by indentures of lease and release and covenant, bearing date respectively the — and — days of —, and respectively made or expressed to be made between the same parties as are parties respectively to the last recited indenture, the said K. L., in consideration of —l. advanced and paid to him by the said A. B. and C. D., again further charged the said secondly hereinafter described copyhold hereditaments and premises, with their appurtenances, with payment unto them, their executors, administrators and assigns, of that sum and of the interest thereof, as well as and in addition to the several principal and interest-monies then already secured thereon, and also by way of further security for the said sum of —l. and the interest thereof, conveyed unto the said A. B. and C. D., and their heirs and assigns for ever, certain hereditaments and estates of freehold tenure situated in the township of — aforesaid, by way of mortgage, and subject to redemption as therein mentioned.

And whereas by a surrender bearing date the — day of —, the said K. L. (who was then possessed or entitled of or to the piece of land, buildings, hereditaments and premises thirdly hereinafter described, for the residue of a certain term of — years therein, hereinafter more particularly referred unto), in consideration of —l. paid and advanced to him by R. A., of — in the said county of —, duly surrendered all and singular the same thirdly-described piece of ground, hereditaments and premises, with their appurtenances, to the use of the said R. A., his executors, administrators and assigns, for all the residue which was then unexpired of the said term, according to the custom of the said manor, as a security for and subject to redemption on payment by the said K. L., his heirs, executors, administrators or assigns, unto the said R. A., his executors, administrators or assigns, of the said principal sum of —l., and of the interest thereof, on the — day of — next following the date of the now-reciting surrender, but in which payment default was made.

And whereas the said R. A. was duly admitted tenant, in pursuance

of the said surrender, at a court held for the said manor on the — day of —, was duly admitted.

And whereas the said K. L. died on or about the — day of —, having made his will in writing, bearing date the — day of —, whereby he gave, devised and bequeathed all and every his messuages and other buildings, farms, lands, grounds, tenements, rents and hereditaments, with the appurtenances, situate or arising within the several townships of — and —, or any of them, unto and to the use of G. H., of —- aforesaid, T. C., of —, in the said county of — (who died in the life of the testator), and I. J., of —, in the same county, of —, their heirs and assigns for ever, upon the several trusts, and with the powers therein declared and contained of selling and conveying, and of giving receipts and discharges for the purchase monies arising from any sales, and of applying such purchase monies in the manner and for the purposes therein declared and set forth, and the testator appointed the said G. H., T. C. and I. J. executors of his said will.

That he died, and by his will devised his property to trustees, in trust to sell.

And whereas the said I. J. alone proved the said will in the Consistory Court of the Bishop of —, on or about the — day of —.

That the will was proved.

And whereas the said I. J., on or about the — day of —, paid off and discharged, out of monies in his hands belonging to the estate of the said testator, the principal and interest monies due and owing unto the said R. A., by virtue of his said recited mortgage security, and by a surrender, bearing date the — day of —, and in pursuance whereof admittance was duly granted at a court held for the said manor on the — day of — next following, the said R. A., in consideration of such payment and discharge as aforesaid of the said principal and interest-monies, surrendered all and singular the said lands and hereditaments thirdly hereinafter described, with their appurtenances, to the use of the said I. J. and G. H., their executors, administrators and assigns, for all the then unexpired residue of the said term of — years therein as aforesaid, according to the custom of the said manor, freed and absolutely discharged from all claims and demands whatsoever, by virtue of the said R. A.'s mortgage security, but nevertheless upon the trusts declared thereof in and by the said K. L.'s said recited will.

That the third mortgage was paid off, and that the trustees were duly admitted under the mortgagee's re-surrender.

And whereas the said several principal sums of —l., —l., —l. and —l. (making altogether —l.) are due and owing to the said A. B. and C. D. upon or by virtue of their said several mortgage securities (and which securities include, in addition to the customary or copyhold lands and hereditaments hereinbefore referred to, divers freehold hereditaments and certain other customary or copyhold lands and estates situate in the county of — aforesaid, not necessary to be more particularly referred to

That the principal is due to the other two mortgagees, who acknowledge the regular payment of all interest thereon.

herein), but all interest on the said several principal sums hath been fully paid and discharged up to the day of the date of this surrender, as the said A. B. and C. D. do hereby respectively admit and acknowledge.

That the trustees effected a sale to the purchaser.

And whereas the said G. H. and I. J., as such surviving trustees as aforesaid of the said K. L.'s will, in pursuance and execution of the trusts and directions in that behalf therein contained, put up certain of the freehold and copyhold estates of the said testator, situate in the aforesaid townships of — and —, for sale by public auction, on the — day of —, —, and M. N. of —, within the township of —, in the said county of —, hath become the purchaser, partly by bidding at the said auction, and partly by private treaty with the said trustees, of the greater part of such freehold and copyhold estates (the copyhold or customary portion thereof being the lands and hereditaments hereinafter described and intended to be surrendered), at prices amounting altogether to the sum of — l.

Stamp duties.

And whereas for ascertaining the stamp duties payable upon the different conveyance to be made to the said M. N., of the said purchased premises, it hath been agreed that in the conveyance of such of them as are of freehold tenure, the sum of — l., part of the said aggregate sum of — l., should be expressed to be paid as the consideration for the same; and that in the surrender of such parts thereof as are of customary or copyhold tenure, the sum of — l., residue of the said — l., should be expressed as the consideration for the same.

Agreement that mortgagees be paid off, the trustees receiving the difference of the purchase money.

And whereas it hath been also agreed between the parties, that the debt or sum of — l. so as aforesaid owing unto the said A. B. and C. D. upon their said mortgage securities, should be paid and discharged unto them out of the sum of — l., apportioned as the consideration for the conveyance of the said lands and hereditaments of freehold tenure as aforesaid, and that the residue of such sum of — l. (being the sum of — l.) should be paid unto the said G. H. and I. J., upon the trusts of the said recited will of the said K. L., and such payments have accordingly been made unto the said A. B. and C. D., and the said G. H. and I. J. respectively, upon or before the execution of the deed of conveyance of such lands and hereditaments of freehold tenure, bearing equal date with this surrender, and executed immediately before the signing and passing thereof, as the said A. B. and C. D., G. H. and I. J. do severally hereby testify, acknowledge and declare.

Purchaser's desire as to manner of assurance.

And whereas the said M. N. is desirous that the said customary or copyhold lands and hereditaments may be surrendered and assured to him in the manner hereinbefore expressed.

The surrender and due acknowledgment.

Now therefore be it remembered that on the — day of —, in the year of our Lord —, in fulfilment of the said desire, and for the con- sideration

rations hereinbefore expressed, and also in consideration of the sum of —*l.* of lawful money of Great Britain (being that part of the said aggregate purchase money or sum of —*l.*, which for the purpose aforesaid is to be considered as the consideration for the surrender hereby made), by the said M. N. in hand, upon or before the signing and passing of this surrender, well and truly paid unto the said G. H. and I. J., upon the trusts aforesaid, the receipt of which said sum of —*l.*, and that the same is the full consideration or apportioned price for the purchase of the several customary or copyhold lands, hereditaments and premises, hereinafter particularly described, and hereby surrendered and assured, or intended so to be, they the said G. H. and I. J. do hereby admit and acknowledge, and thereof and therefrom, and of and from the same and every part thereof, do respectively acquit, release, and discharge the said M. N., his heirs, executors and administrators, and every of them, and also all and singular the said purchased lands and hereditaments, for ever by these presents : And also in consideration of the sum of ten shillings of like lawful money, by the said M. N. in hand, at the same time likewise well and truly paid unto each of them the said E. F., A. B. and C. D., the respective receipts whereof are hereby acknowledged : HE the said E. F. (as for and concerning only the lands and hereditaments firstly hereinafter described, and intended to be surrendered, and according only to his estate and interest therein, as surviving trustee thereof, by virtue of the said surrender of the — day of —, —, and at the request and by the direction as well of the said G. H. and I. J. as of the said A. B. and C. D., testified by their severally being made parties to, and signing and passing, this surrender) : And the said A. B. and C. D. (as for and concerning only the lands and hereditaments firstly and secondly hereinafter described and surrendered, or intended so to be, and according only to their estate and interest in such premises as mortgagees thereof respectively by virtue of the several mortgage surrenders and securities hereinbefore recited or referred to, and also at the request and by the direction of the said G. H. and I. J., and so testified as aforesaid) : And also the said G. H. and I. J. (as for and concerning the whole of the lands, hereditaments and premises hereinafter described and intended to be surrendered, and the whole of their estate, right, and interest therein, as such surviving trustees for sale and executors as aforesaid, or otherwise howsoever) HAVE, and each and every of them HATH, surrendered and given up, and by these presents DO, and each and every of them DORU, surrender and give up into the hands of the lord of the said manor by a rod, and by the hands and acceptance of —, and according to the custom of the said manor ;

Firstly, all, &c.

And secondly, all, &c.

And thirdly, all, &c.

Parcels,

ments of the
receipt of the
several con-
siderations.

General
words.

Together with all and singular houses, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, ways, paths, passages, hedges, fences, ditches, trees, woods, underwoods, waters, watercourses, common of pasture and turbary, and other commonable rights, liberties, easements, profits, privileges, commodities, advantages, emoluments, hereditaments and appurtenances whatsoever, to the said several messuages or tenements, farms, lands, grounds, hereditaments and premises, firstly, secondly, and thirdly hereinbefore described, or any of them belonging or in anywise appertaining, or now or heretofore usually held, occupied, or enjoyed therewith ;

And the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof ;

And all the estate, right, title, interest, term and terms for years yet to come and unexpired, inheritance, use, trust, possession, property, claim and demand whatsoever, at law and in equity, of each of them the said E. F., A. B., C. D., G. H. and I. J., of, in, to or out of the same several lands, hereditaments and premises, and every part thereof ;

The uses.

To the uses following, that is to say, as for and concerning the messuages or tenements, farms, lands, hereditaments and premises, firstly and secondly hereinbefore described, with their respective appurtenances ;

To the use and behoof of the said M. N., his heirs and assigns, absolutely for ever, according to the custom of the said manor ; And as for and concerning the piece or parcel of ground, buildings, hereditaments and premises thirdly hereinbefore described, with their appurtenances (except as aforesaid) ;

To the use and behoof of the said M. N., his executors, administrators and assigns, for and during all the rest, residue and remainder now to come and unexpired of the said term of — years created therein as aforesaid, according to the custom of the said manor, subject nevertheless as to the whole of the said lands, hereditaments and premises, to the customary rents and services henceforth to grow due in respect thereof ; And as to the said piece of ground and hereditaments thirdly hereinbefore described, with their appurtenances, to the aforesaid yearly ground rent of —*l.*, reserved and issuing thereout as hereinbefore is mentioned, and to the means and remedies for the recovery thereof reserved to the said —, his heirs or assigns, or incident thereto ; but as to the whole thereof, freed and absolutely released and discharged from henceforth, and at all times hereafter, by the said A. B. and C. D. respectively, of and from all monies due or secured to them for principal, interest, or otherwise, upon or by virtue of their several mortgage securities hereinbefore recited or referred unto, or any of them, and all claims and demands whatsoever on account thereof ;

Yielding and paying for the said hereditaments and premises, the rents and services therefore due, and of right accustomed.

Signed by the said —, in my presence,
and by — and —, surrendered into
my hands, }

In the presence of —.

(The receipts should be added.)

(IV.)

*The RELEASE and CONVEYANCE of the FREEHOLDS,
and the DEED of COVENANTS to the above Surrender
of the COPYHOLDS.*

THIS Indenture, made the—day of—, in the year of our Lord —, Date and
Parties.
BETWEEN A. B. and C. D., both of —, in the county of —, of the first
part; E. F. of —, in the same county of — of the second part; G. H. of —
aforesaid, and I. J., of —, in the said county of —, of the third part;
K. L. of —, in the same county of —, of the fourth part; M. N. of —,
aforesaid of the fifth part, and O. P. of — aforesaid, of the sixth part;

WHEREAS by indentures of lease and release and settlement, bearing date
respectively the —th, and —th days of —, the release and settle-
ment being made, or expressed to be made, between Q. R. of —, in the
— of —, in the said county of — aforesaid, of the first part; K. L.
of — aforesaid — (the father of the said K. L., party hereto,) and
S. L., his wife, (formerly S. T., spinster) of the second part; U. T., of —
aforesaid — (the father of the said S. L.) of the third part; V. W., of
— aforesaid, and X. Y. of the same place —, of the fourth part,
and the said E. F. and Z. T., of — in the said county of — (who is
since dead) of the fifth part, and by virtue of a recovery suffered in pur-
suance of the said indentures, at the spring assizes holden for the county
— of — in the — year of the reign of his Majesty King George
the Third, in which the said E. F. and Z. T., were demandants of the said
V. W. and X. Y., tenants, and the said K. L., (the father and S. his wife)
vouchees, divers freehold and customary or copyhold messuages, farms,
lands, hereditaments, and estates situate in the county of — (comprising
along with others, the whole of the freehold messuages, farms, lands and
hereditaments hereinafter particularly described, and hereby released and
conveyed, or intended so to be, and also the several customary or copyhold
messuages or tenements, farms, lands and hereditaments, firstly hereinafter
described and hereby covenanted to be surrendered), together with the

Recitals :
The marriage
settlement,
&c., of the
parents of the
fourth party
thereto;

appurtenances, were, in execution of certain articles of agreement, bearing date the — day of —, then preceding, which had been entered into in consideration and contemplation of the marriage then intended, and which was shortly afterwards solemnised between the said K. L., the father and S. T. and in consideration of such marriage, and for other the considerations in the said indenture of release and settlement expressed, duly conveyed, limited, settled and assured to the use of the said K. L. the father, and his assigns for his life, sans waste, with remainder to the use of the said E. F. and Z. T., and their heirs, during the life of the said K. L., the father; Upon trust to preserve the contingent remainders thereafter limited, with remainder after the decease of the said K. L. the father, to the use, intent, and purpose that the said S. L., and her assigns, if she should survive the said K. L. her husband, might receive and take thereout during her natural life a jointure, rent-charge, or annual sum of ——*l.*, to be issuing and payable half-yearly as therein mentioned, clear of all deductions, and with powers of distress and entry upon the said lands and hereditaments charged with the said rent, for recovering and compelling payment of the same when in arrear, and subject to such jointure, rent-charge, and the powers and remedies provided for the recovery thereof, all and singular the said freehold and customary and copyhold messuages, tenements, farms, lands, hereditaments and estates, with the appurtenances, were declared to be and enure ~~To the use~~ of the said K. L. the father, his heirs and assigns, absolutely for ever;

Surrender in
pursuance of
the before
recited mar-
riage settle-
ment;

And whereas by a surrender in writing, duly signed and passed according to the custom of the manor of — in the county of —, and bearing date the — day of — in the said year —, the said K. L. the father, and by his direction, the said Q. R., (who was then seised of the legal estate of the said customary or copyhold hereditaments, firstly hereinafter described), severally surrendered all and singular the same firstly described messuages or tenements, farms, lands, hereditaments and estates, with their appurtenances, to the use of the said E. F. and Z. T., their heirs and assigns for ever, to stand fined and seised thereof, nevertheless to the several uses, upon the trusts, and for the intents and purposes, and charged in the manner, and subject to the several powers, provisoes, limitations, declarations and agreements, mentioned, expressed or contained concerning the same in and by the indenture of release and settlement hereinbefore recited; and at a court holden for the manor of — aforesaid, on the — day of — next following the date of the said surrender, the said E. F. and Z. T. were duly admitted tenants of the said customary or copyhold hereditaments, in pursuance thereof;

Mortgage of
the first de-
scribed pre-
mises;

And whereas by indentures of lease and release and covenant, bearing date respectively the — and — days of —, and respectively made

or expressed to be made, between the said K. L. the father, of the one part, and the said A. B. and C. D., of the other part; the said K. L. the father, in consideration of the ———*l.* lent and advanced to him by the said A. B. and C. D., did duly release, convey and assure all and singular the aforesaid several freehold messuages or tenements, farms, lands, hereditaments and estates hereinafter particularly described, and hereby released and conveyed, or intended so to be (along with others) and did also covenant duly to surrender the aforesaid several customary or copyhold messuages or tenements, farms, lands and hereditaments, firstly hereinafter described, (together with other lands and estates of customary or copyhold tenure,) to the use of the said A. B. and C. D., their heirs and assigns for ever, as a security for and subject to redemption on payment by the said K. L. the father, his heirs, executors, administrators or assigns, unto the said A. B. and C. D., their executors, administrators or assigns, of the aforesaid principal sum of ———*l.*, together with interest thereon after the rate therein mentioned, on the ——— day of ——— next following the date of the now reciting indenture, and in which payment default was made.

And whereas the said K. L. the father, in pursuance and execution of the covenant in that behalf contained in the lastly hereinbefore in part recited indenture of release, did, by a surrender or memorandum in writing, bearing date the said ——— day of ———, duly surrender according to the custom of the manor of ——— aforesaid, all and singular the said several customary or copyhold messuages, farms, lands, hereditaments and estates, firstly hereinafter described, with the appurtenances, to the use of the said A. B. and C. D., their heirs and assigns for ever, but subject to redemption as in the said lastly hereinbefore in part recited indenture mentioned, and at a court held for the said manor on the ——— day of ——— next following, the said A. B. and C. D. were duly admitted in pursuance of such surrender;

Surrender
pursuant to
the aforesaid
mortgage;

And whereas by a surrender or memorandum in writing, bearing date the ——— day of ———, the said K. L. the father, being fined and seised for an estate of inheritance in possession, according to the custom of the manor of ——— aforesaid, of and in the two several customary or copyhold messuages or tenements, farms and estates, called respectively—— and——, secondly hereinafter particularly described, in consideration of ———*l.*, lent and advanced to him by the said A. B. and C. D., duly surrendered all and singular the same last mentioned customary or copyhold estates and hereditaments, with their respective appurtenances, (along with other property) to the use of the said A. B. and C. D., their heirs and assigns for ever, according to the custom of the said manor, subject to an agreement or

Mortgage of
the secondly
described
premises;

condition subjoined to the now reciting surrender for redemption of the said lands and hereditaments, on payment by the said K. L. the father, his heirs, executors or administrators, unto the said A. B. and C. D., their executors, administrators or assigns, of the principal sum of —*l.*, and the interest thereof after the rate therein mentioned, together with certain incidental expences therein referred unto, on the — day of — succeeding the date of the now reciting surrender, but in which payment default was made ;

Admission
of the mort-
gages ;

And whereas the said A. B. and C. D. were duly admitted tenants of the said last mentioned lands and hereditaments, in pursuance of the said surrender, at a court held for the said manor on the day of the date thereof ;

Further
charges ;

And whereas by an indenture, bearing date the — day of —, and made or expressed to be made between the said K. L. the father, of the one part, and the said A. B. and C. D. of the other part ; the said K. L. the father, for the considerations therein mentioned, further charged the lands and hereditaments comprised in the lastly hereinbefore in part recited surrender with the payment unto the said A. B. and C. D., their executors, administrators and assigns, of the principal sum of —*l.*, and the interest thereof, in addition to the principal and interest monies secured or intended to be secured by the same recited surrender, and by indentures of lease and release and covenant, dated respectively the — and — days of —, and respectively made, or expressed to be made, between the same parties as are parties respectively to the indenture last referred unto ; the said K. L. the father, again further charged the said lands and hereditaments, secondly hereinafter described, with the principal sum of —*l.* and interest, in addition to and in the same manner as the said principal sums of —*l.*, and —*l.*, then already secured thereupon, and the interest thereof respectively, and as a further security, granted and conveyed certain freehold hereditaments situate in the township of — aforesaid, unto and to the use of the said A. B. and C. D., their heirs and assigns for ever, but subject to redemption, as in the now reciting indenture of release is mentioned ;

Mortgage of
the thirdly
described
premises ;

And whereas by a surrender in writing, also duly signed and passed according to the custom of the manor of — aforesaid, and bearing date the — day of —, the said K. L. the father, in consideration of —*l.*, paid and advanced to him by R. A. of —, in the said county of —, surrendered the customary or copyhold piece of ground, buildings, hereditaments and premises thirdly hereinafter described, and hereby covenanted to be surrendered, and of or to which the said K. L. the father, was possessed or entitled for the residue of a term of — years, to commence and be computed from the — day of —, with their appurtenances, To the use of the said R. A., his executors, administrators and assigns, for all the then residue of

the said term, as a security for and subject to a proviso for redemption on payment of the principal sum of —£, with interest thereon, on the — day of — next following the date of the said surrender, but in which payment default was made;

And whereas the said R. A. was duly admitted in pursuance of the said surrender at a court held for the said manor on the — day of —; Admission of the mortgagee;

And whereas the said K. L. the father departed this life on or about the — day of —, having first made and published his last will and testament in writing, which was executed by him in the presence of and attested by three witnesses, and bears date the — day of —, 1836 (a), whereby he gave, devised and bequeathed all and every his messuages and other buildings, farms, lands, grounds, tenements, rents and hereditaments, with the appurtenances, situate or arising within the several townships of —, —, —, and —, —, —, or any of them, unto and to the use of the said G. H., T. C., of — Castle in the said county of —, (who died in the life-time of the testator,) and the said I. J., and their heirs and assigns for ever; In trust nevertheless, and to and for the several intents and purposes thereafter declared and set forth concerning the same (that was to say) upon trust that they the said G. H., T. C. and I. J., and the survivors and survivor of them, and the heirs and assigns of such survivor, should from time to time, when and as they should deem necessary or expedient, by and out of the rents, issues and profits, of the said hereditaments and premises, or by mortgage or sale of the whole or a competent part thereof, or by both those means, raise and levy such sum and sums of money as would be sufficient to pay so much of his the testator's debts and funeral and testamentary expences as his personal estate should fall short or be insufficient to pay and satisfy, and also for payment of the sum of —£, by his will directed to be raised for the benefit of his daughter S., or any part of such sum, or for disincumbering his estates, or any part thereof, from any sum or sums of money which should in the meanwhile have been borrowed by his said trustees or trustee for those purposes, or for any other charges effecting the same: And the said testator declared that in order to facilitate any mortgage or sale, mortgages or sales, of the same messuages and other buildings, farms, lands, grounds, tenements, rents and hereditaments, or any part or parts thereof, for the purposes aforesaid, the receipt or receipts of his said trustees or trustee for the time being should be a good and sufficient discharge or discharges to the mortgagee or mortgagees, purchaser or purchasers of any of the same messuages and other buildings, farms, lands, grounds, tenements, rents and hereditaments, or any part or parts thereof,

(a) Since 1st January 1838, only two witnesses are requisite, pursuant to 1 Vict., c. 26, § 9.

for his, her, or their mortgage or consideration money, or for so much thereof, as in such receipt or receipts should be expressed to be received, and that such mortgagee or mortgagees, purchaser or purchasers, his, her, or their heirs, executors, administrators or assigns should not afterwards be answerable or accountable for any loss, misapplication, or non-application thereof, or of any part thereof; neither should he, she, or they respectively be concerned to enquire into the necessity or expediency of making any such mortgage or sale for the purposes therein mentioned; and the said testator hereby declare that in case any surplus should remain after satisfying the purposes aforesaid, the said trustees and the survivors and survivor of them, and the executors, administrators and assigns of such survivor, should stand possessed thereof, as well as of the residue of his real estate in trust for his said son the said K. L., party hereto, his heirs, executors, administrators and assigns, and he appointed the said G. H., T. C. and I. J., executors of his said will;

Will proved; **And whereas** the said I. J. alone proved the said will in the Consistory Court of the Bishop of —, on or about the — day of —, —;

Satisfaction of the mortgage on the thirdly described premises, and the re-surrender;

And whereas the said I. J., on or about the — day of —, —, paid off and discharged, out of monies in his hands belonging to the estate of the said testator, the principal sum of —*l.*, due and secured to the said R. A. by virtue of the surrender of the — day of —, —, hereinbefore recited, together with the interest accrued due thereon, and by a surrender bearing date the — day of —, —, the said R. A., in consideration of such payment having been made, duly surrendered and assured all and singular the said thirdly hereinafter described hereditaments and premises, with their appurtenances, to the use of the said G. H. and I. J., their executors administrators and assigns, for all the then residue of the said term of — years therein, discharged of the said principal and interest monies, and the securities for the same, but upon the trusts and for the purposes declared thereof by the said recited will of the said K. L., the father; and at a court held for the said manor on the — day of — last, the said G. H. and I. J. were duly admitted in pursuance of such surrender;

The unsatisfied mortgage;

And whereas the aforesaid several principal sums of —*l.*, —*l.*, —*l.* and —*l.* (making altogether the sum of —*l.*), are still owing to the said A. B. and C. D., upon or by virtue of their said several recited mortgage-securities; but all interest on the said several principal sums hath been fully paid and discharged up to the day of the date of these presents, as the said A. B. and C. D. do hereby respectively admit and acknowledge;

Insufficient personal es-

And whereas the personal estate of the said testator having been found

to be very inconsiderable in amount or value, and adequate only to the discharge of a very small portion of his debts, and the said K. L., party hereto, being desirous that a sum of money should be immediately raised by sale of the whole, or of a competent part of the estates and real property, late belonging to his father, and by his said recited will subjected to the trusts and powers of sale aforesaid, sufficient for the discharge as well of the said testator's debts and liabilities still unsatisfied, as of the sum of —£. by the said will directed to be raised and given and bequeathed as the fortune of the testator's said daughter, the said G. H. and I. J., as well in fulfilment of the said recited desire of the said K. L., party hereto, as in pursuance and execution of the trusts and directions in that behalf contained in the said recited will of the said K. L. the father, put up the freehold and copyhold estates of the said testator, situate in the townships of — and — aforesaid, for sale by public auction, at the — hotel, near — aforesaid, on Thursday the — day of — last; and the said M. N. having bid the sum of —£. at such auction for the several freehold and customary or copyhold lands, hereditaments and estates, hereinafter particularly described, and also included in the first schedule hereunder written (such first schedule being a transcript as near as may be) of the particulars of sale printed and circulated in contemplation of the said auction, so far as such particular comprises the lands and property purchased by the said M. N.), except and reserving as hereinafter mentioned, was declared the highest bidder for, and the purchaser of, the same freehold and copyhold hereditaments, at that price, subject nevertheless to the conditions of sale produced and read at such auction;

And whereas by the said conditions it was, amongst other things, stipulated and provided, that the purchaser of the said estates was to take the timber standing thereon at the sum of —£., being the amount of the valuation thereof recently made, and also that the pieces or parcels of land numbered respectively — and —, upon the plan annexed to the particulars of sale hereinbefore referred unto (and which is also endorsed on the — skin of these presents) should be taken, subject to the contract with the — Waterworks Company, hereinafter more particularly mentioned, and that the purchaser, when called upon, should carry such contract into execution, and further that the purchaser of such parts of the said estates as were comprised in the said settlement of the — day of —, —, should accept and be satisfied with a bond from one or more responsible person or persons for indemnifying such purchaser and the said estates from all future payments in respect or on account of the said jointure-rent-charge of —£. per annum, with which the same estates are by such settlement charged in favour of the said S. L. (the wife, and now the widow of the said testator),

tate, and sale
of the free-
holds and
copyholds.

Valuation of
the timber;

Reservations. and her assigns, during her life ; And the said vendors did also thereby reserve to themselves the mines, beds, veins and seam of coals and cannel, under such parts of the said estates and hereditaments as are of freehold tenure, with such incidental liberties and privileges as are mentioned or referred to in the said conditions, but the purchaser of the said estates was to have the option by giving notice in writing to the said I. J., within seven days from the day of sale, of his election so to do, of purchasing the said coal and cannel for such sum as two referees or an umpire, to be respectively appointed as therein mentioned, should fix and determine, and which sum it was declared should be added to the purchase-money for the said estates, and to be paid at the same time ;

Option of
purchaser ;

And ~~whereas~~ the said M. N. having, immediately after the said auction, declared his option to purchase the said coal and cannel, shortly afterwards entered into an agreement with the said I. J. (who was thereto authorised by the said G. H., his co-trustee under the said K. L. the father's will, as well as by the said K. L., party hereto, as they do hereby respectively acknowledge) for the purchase of the said coal and cannel at the price or sum of —£. as appears by a memorandum of such agreement under the hands of the said M. N. and I. J. respectively, bearing date the — day of the said month of — last, and endorsed upon the said recited conditions of sale ;

Acceptance
of indemnity ;

And ~~whereas~~ the said M. N. hath agreed to accept as an indemnity against the said S. L.'s jointure-rent-charge, the joint and several bond or obligation in the penal sum of —£. of the said K. L., party hereto, and of U. T., of — aforesaid,—which bond hath been already prepared and executed by the said obligors, and bears equal date with these presents, and is intended to be handed over to the said M. N. upon or immediately after the completion of his aforesaid purchase ;

Aggregate
purchase
money ;

And ~~whereas~~ the aforesaid two several sums of —£., for the value of the said timber, and —£. for the purchase of the said coal and cannel, when added to the said sum of —£. bidden by the said M. N. for the said estates at the aforesaid auction, make up the aggregate price or consideration for the purchase of the several freehold and customary or copyhold lands, hereditaments and estates hereby released and conveyed, or expressed, and intended so to be, and covenanted to be surrendered respectively, unto the sum of —£. ;

Stamp duties ;

And ~~whereas~~ for ascertaining the stamp duties payable upon the different conveyances to be made of the said purchased premises in execution of the said contracts, it hath been agreed between the said G. H. and I. J. and the said M. N., that in the conveyance of such of the said purchased premises as are of freehold tenure the sum of —£., part of the said aggregate

sum of —*l.*, shall be expressed to be paid as the consideration for the same, and that in the surrender to be made of such of the said purchased lands and hereditaments as are of customary or copyhold tenure, the sum of —*l.*, residue of the said —*l.*, should be expressed as the consideration for the same ;

And whereas the said M. N. is desirous that the said purchased premises shall be conveyed and assured to the uses and in the manner hereinafter expressed :

Now this Indenture witnesseth that in fulfilment of the said desire, and in consideration of the sum of —*l.*, of lawful money of Great Britain, (being that part of the said aggregate purchase money, or sum of —*l.*, which, for the purpose aforesaid, is to be considered as the consideration for the conveyance of such of the said purchased premises as are of freehold tenure) by the said M. N., in hand, at or before the execution of these presents, well and truly paid, in the proportions and manner following, (that is to say) —*l.*, part thereof, to the said A. B. and C. D., in full satisfaction and discharge of all monies due and owing to them, or either of them, for principal, interest or otherwise, upon, or by virtue of their said several mortgage securities by the direction of the said G. H. and I. J., as such surviving trustees and executors as aforesaid, named in the said K. L. the father's will, and with the privity and approbation of the said K. L., party hereto (testified by their severally executing these presents), and —*l.*, the residue of the said sum of —*l.*, to the said G. H. and I. J. as such surviving trustees and executors as aforesaid, and with the like privity and approbation of the said K. L., party hereto, and so testified as aforesaid ; the receipts of which said several sums of —*l.*, and —*l.*, and that the same together form the whole apportioned consideration money or price for the purchase of the several freehold lands, hereditaments and estates, hereinafter particularly described, and hereby released and assured, or intended so to be ; they the said A. B. and C. D., and G. H. and I. J., do hereby severally admit and acknowledge, and of and from the same respective sums, and every part thereof respectively, do, and each, and every of them, doth acquit, release and discharge the said M. N., his appointees, heirs, executors, administrators and assigns, as well as the said purchased lands and hereditaments for ever by these presents ; and likewise in consideration of the sum of ten shillings of like lawful money by the said M. N., in hand at the same time, also well and truly paid unto each of them the said E. F. and K. L., party hereto, and of the like sum also paid by the said O. P. unto each of the several persons, parties hereto of the first, second, third and fourth parts, at or before the execution of these presents, the respective receipts whereof are hereby acknowledged : **Then** the said A. B. and C. D.,

Mode of
assurance.

First testa-
ment as to the
freeholds.

E. F., G. H., and I. J., according to their several and respective estates, rights and interests in the premises, the said A. B. and C. D., as such mortgagees thereof as aforesaid, the said E. F. as the surviving trustee of and under the said settlement of the — day of — hereinafore recited, and the said G. H. and I. J., as the surviving devisees in trust for sale of the said K. L., the father's aforesaid real estates under his will hereinafore recited, ~~That~~, and each and every of them, ~~That~~, bargained, sold, aliened, released and conveyed, and by these presents ~~Do~~, and each and every of them ~~Doth~~, (according to their respective estates and interests as aforesaid,) bargain, sell, alien, release and convey; and the said K. L., party hereto ~~That~~ bargained, sold, aliened, released, ratified and confirmed, and by these presents ~~Doth~~ bargain, sell, alien, release, ratify, and confirm unto the said M. N. and his heirs (this present indenture of release being made in pursuance of an act of Parliament passed in the fourth year of the reign of her Majesty Queen Victoria, intituled, "An Act for rendering a Release as effectual for the conveyance of Freehold Estates as a Lease and Release by the same parties"^a),

Parcels.

~~All~~, &c.;

General words.

~~And~~ all and singular houses, out-houses, edifices, buildings, barns, stables, yards, gardens, orchards, ways, paths, passages, hedges, fences, ditches, trees, woods, underwoods, mines, minerals, delfs, quarries, waters, watercourses, commons, common of pasture, and other commonable rights, liberties, easements, profits, privileges, commodities, advantages, emoluments, hereditaments and appurtenances whatsoever to the said several messuages or tenements, farms, lands, grounds, hereditaments and premises, or any of them, belonging or in anywise appertaining, or now or heretofore usually held, occupied, or enjoyed therewith;

~~And~~ the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof;

~~And~~ all the estate, right, title, interest, inheritance, use, trust, possession, property, claim and demand whatsoever, at law and in equity, of each of them the said A. B., C. D., E. F., G. H., I. J. and K. L., party hereto, of, in, and to the same hereditaments and premises, and every part thereof.

(a) This act was abolished, and more extensive provisions made, by 7 & 8 Vict., c. 76, § 2, which was, in its turn, abolished by 8 & 9 Vict., c. 106, § 2, and this act rendered it unnecessary to insert the statute in the conveyance, as in the above form, but retained the lease-for-a-year stamp upon the release. This stamp was, however, repealed by 13 & 14 Vict., c. 97, § 6. Grants are now used in preference to releases, in pursuance of 8 & 9 Vict., c. 106, s. 2.

To have and to hold the said messuages or tenements, farms, lands, *Tenendum.* grounds, hereditaments, and all and singular other the premises hereinbefore mentioned and described or referred unto, and hereby granted, released and conveyed, or intended so to be, with their appurtenances, unto the said M. N. and his heirs, freed and absolutely discharged from henceforth and at all times hereafter of and from all monies due or secured to the said A. B. and C. D. respectively, for principal, interest, or otherwise, by virtue of their said recited mortgage-securities, or any of them, and all claims and demands whatsoever in respect or on account thereof, but subject, as to the said farm now called —, to the agreement for a lease to the present occupier thereof, more particularly referred unto in the particular of the said farm, comprised in the said first schedule hereto, Nevertheless

To the use of such person or persons, for such estate or estates, ends, in- *Uses.* tents and purposes, and under and subject to such powers, provisos, charges, declarations and agreements as the said M. N., by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of and attested by one witness or more, shall from time to time, or at any time direct, limit or appoint, and in default of and until such direction, limitation or appointment, and so far as the same, if incomplete, shall not extend, To THE USE of the said M. N. and his assigns, during his life, without impeachment of waste; And from and after the determination of that estate by any means in his lifetime, To THE USE of the said O. P. and his heirs during the life of the said M. N., In trust for the said M. N. and his assigns, and from and after the determination of the estate so limited, in use to the said O. P. and his heirs, during the life of the said M. N., to the only proper use and behoof of the said M. N., his heirs and assigns for ever:

And this Indenture further witnesseth, that in further fulfilment of the said recited desire, and for the considerations hereinbefore expressed, and also in consideration of the sum of ——l., (the residue of the said aggregate sum or purchase price of ——l.) of lawful money aforesaid, by the said M. N., in hand also at or before the execution of these presents, well and truly paid unto the said G. H. and I. J., upon the trusts and for the purposes of the said recited will of the said K. L., the father, with the like privity and approbation of the said K. L., party hereto, and so testified as aforesaid, the receipt whereof they the said G. H. and I. J. do, and each of them doth, hereby admit and acknowledge, and from the same and every part thereof, do respectively acquit, release, and discharge the said M. N., his heirs, executors, administrators and assigns, and also all and singular the said purchased lands and hereditaments for ever, by these presents, He the said K. L., party hereto, for himself, his heirs, executors and administrators, doth hereby covenant with the said M. N., his heirs and assigns, that they

Second testament as to the copy holds.

Covenant to surrender.

the said A. B. and C. D., E. F., G. H. and I. J., or their respective heirs, executors or administrators, and all other necessary parties, shall and will, at or before the next halmot, or other proper court, to be holden for the said manor of —, at the request, costs and charges of the said M. N., his heirs or assigns, duly surrender into the hands of the lord of the said manor, according to the custom thereof (in which surrender such consideration for the same is to be expressed as aforesaid);

Parcels.

Firstly, **¶**, &c.

And secondly, **¶**, &c.

And thirdly, **¶**, &c.

General words.

Together with all and singular houses, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, ways, paths, passages, hedges, fences, ditches, trees, woods, underwoods, waters, watercourses, common of pasture and turbary, and other commonable rights, liberties, easements, profits, privileges, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said several messuages or tenements, farms, lands, grounds, hereditaments and premises, or any of them, belonging or in anywise appertaining or used, or heretofore usually held, occupied or enjoyed therewith;

Uses.

To the uses following, (that is to say) as for and concerning the messuages or tenements, farms, lands, hereditaments and premises, firstly and secondly hereinbefore described, with their respective appurtenances, and all other the copyhold or customary lands and hereditaments (if any) hereby covenanted to be surrendered as aforesaid, and which are not included in the several ancient descriptions hereinbefore contained: **T**o the use of the said M. N., his heirs and assigns, absolutely and for ever, according to the custom of the said manor: and as for and concerning the piece or parcel of ground, buildings, hereditaments and premises, thirdly hereinbefore described, (except as aforesaid) with their appurtenances, **T**o the use of him, his executors, administrators, and assigns, for and during all the residue and remainder, which, at the date of the surrender to be made thereof as aforesaid, shall be to come and unexpired of the said term of — years therein as aforesaid, according to the custom of the said manor; subject nevertheless, as to the whole of the said lands, hereditaments and premises hereinbefore described and mentioned to be of copyhold tenures, to the customary rents and services henceforth to grow due in respect thereof, and as to the said lands and hereditaments, held for the residue of the said term of — years, to the yearly ground-rent of —*l.* hereinbefore mentioned, and to the means and remedies for the recovery thereof reserved to the said —, his heirs or assigns, or incident thereto, and as to such parts of the aforesaid lands and hereditaments as are affected thereby, to the several leases or agreements for

leases particularly referred unto in the said several parts of the said first schedule hereto; and as to the two small pieces of land, numbered respectively — and —, upon the aforesaid map or plan, to the agreement some time ago entered into by the said K. L., the father, with the — company, for a lease thereof to them for the term of — years, and under the yearly rent of —*l.*, but freed and wholly released and discharged from henceforth and at all times hereafter by the said A. B. and C. D. respectively, of and from all monies due or secured to them for the principal, interest, or otherwise, upon or by virtue of their several mortgage-securities effecting the same respectively hereinbefore recited or referred unto, or any of them, and all claims and demands whatsoever on account thereof :

And the said A. B., C. D., E. F., G. H., and I. J., for themselves severally and respectively, and for their several and respective heirs', executors', administrators' acts, deeds and defaults only, but not jointly, or one for the others, or any other of them, or for the heirs', executors', or administrators' acts, deeds, or default of the others, or any other of them, do hereby covenant and declare with and to the said M. N., his appointees, heirs, and assigns, that they the said covenantors respectively have not at any time heretofore done, committed, or willingly permitted or suffered, or been parties or privies to any act, deed, or thing whatsoever, by reason whereof the said freehold and customary or copyhold messuages or tenements, farms, lands, grounds, hereditaments and premises, hereinbefore mentioned to be hereby granted and released, and hereby covenanted to be surrendered respectively, or the said term of — years, in part thereof, or any of them, or any part thereof respectively, are, is, can, shall or may be impeached, charged, affected, surrendered, merged or incumbered in title, estate, or otherwise howsoever ;

And the said K. L., party hereto, for himself, his heirs, executors and administrators, doth hereby covenant with the said M. N., his appointees, heirs and assigns, in manner following, that is to say, That for and notwithstanding any act, matter, or thing whatsoever, by the said K. L., party hereto, and K. L., the father, deceased, or either of them, or any person or persons whomsoever claiming under or in trust for them, or either of them, done, committed, or willingly omitted or suffered to the contrary, they the said A. B., and C. D., E. F., G. H., I. J., and K. L., party hereto, or some or one of them, now have or hath in themselves or himself, good right, full power, and absolute authority to release and convey and surrender and assure, all and singular the said freehold and customary or copyhold hereditaments and premises hereby released and conveyed, or intended so to be, and covenanted to be surrendered, respectively, with their appurtenances, unto and to the use of the said M. N., his appointees, heirs, executors, administrators and assigns, in the manner hereinbefore expressed touching the same respectively, and according to the true intent and meaning of these presents ;

Covenants;

against incumbrances.

Good right to alienate.

Enjoyment
without in-
terruption ;

And also that for and notwithstanding any such act, matter, or thing as aforesaid, the same freehold and customary or copyhold hereditaments and premises, and the rents and profits thereof, shall and may, at all times hereafter, and from time to time, be, and remain, **To, upon, and for the uses, trusts, and purposes** hereinbefore expressed and declared concerning the same respectively, and shall and may be held, possessed, received, and enjoyed accordingly, without any lawful let, suit, hinderance, interruption or disturbance whatsoever, of, from, or by the said K. L., party hereto, or any person or persons whomsoever, lawfully claiming or to claim through, under, or in trust for him, or the said K. L., his late father, deceased ;

Freedom
from incum-
brances ;

And that free and clear and absolutely discharged or otherwise by the said K. L., party hereto, his heirs, executors or administrators, well and sufficiently saved harmless and indemnified, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, jointures, dowers, surrenders, uses, wills, entails, statutes, seizures, amerciaments, forfeitures, rents and arrears of rent, estates, titles, charges and incumbrances whatsoever, made, done, committed or suffered by the said K. L., party hereto, and K. L., his father, deceased, or either of them, or any person or persons whomsoever, claiming or to claim, through, under, or in trust for them, or either of them, or by, through or under their or either of their means, default, consent, privity or procurement, (save and except the customary rents and services hereafter to become due in respect of the said copyhold hereditaments and premises respectively, and also save and except as otherwise appears by these presents) ;

Further as-
surance,

And further, that he the said K. L. party hereto, and his heirs, and all persons whomsoever lawfully claiming or to claim, through, under, or in trust for him, or the said K. L., his late father, deceased, shall and will, from time to time and at all times hereafter, at the request and proper costs and charges of the said M. N., his appointees, heirs, executors, administrators or assigns, make, do, acknowledge, sign, pass and execute, or cause and procure to be made, done, acknowledged, signed, passed and executed, all and every such further and other lawful and reasonable acts, deeds, surrenders, devices and assurances in the law whatsoever, for further, better, and more absolutely granting, releasing, surrendering and assuring to the uses in manner aforesaid, according to the true intent and meaning of these presents, (but subject nevertheless as aforesaid), all and every the same freehold and customary or copyhold lands, hereditaments and premises, hereby released and conveyed, or intended so to be, and covenanted to be surrendered respectively, with their and every of their appurtenances, as by the said M. N., his appointees, heirs, executors, administrators or assigns, or his, their or any of their counsel, shall be devised or advised and re-

quired, so as the person or persons who shall be required to make and execute the same be not compelled or compellable to go from home for that purpose ;

And whercas the several deeds, evidences and writings, specified in the second schedule hereunder written or hereunto subjoined, relate to or concern divers estates and property retained by the said K. L., party hereto, as well as the several lands and hereditaments so contracted to be sold to the said M. N. as aforesaid, or some of them, and by the aforesaid conditions of sale it was stipulated and provided that such deeds and writings should be retained by the said K. L., party hereto, who should enter into a covenant with the said M. N. in the usual manner for the production thereof :

Now this Indenture lastly witnesseth, that in pursuance of the said last recited agreement, and for the considerations hereinbefore expressed, be the said K. L., party hereto, doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said M. N., his appointees, heirs and assigns, that be the said K. L., party hereto, his heirs or assigns, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said M. N., his appointees, heirs or assigns, produce and show forth, or cause and procure to be produced and shewn forth unto the said M. N., his appointees, heirs or assigns, or to such person or persons as he or they shall desire or require, or at or upon any trial, hearing, or commission for the examination of witnesses in any court of law or equity, or other judicature in England, or otherwise, as occasion shall require, All and every or any of the deeds, muniments, evidences and writings, specified in the said second schedule hereunder written or hereunto subjoined, for the proof, manifestation, support, or defence of the title of the said M. N., his appointees, heirs and assigns, in or to the said freehold and customary or copyhold lands, hereditaments and premises respectively, or any of them, and shall and will at all times hereafter, and from time to time at the like request, costs and charges, make and deliver, or cause to be made and delivered unto the said M. N., his appointees, heirs or assigns, or unto such person or persons as he or they shall appoint, true and attested copies, or true copies unattested, or abstracts of, or extracts from the same several deeds and writings, or any of them, and permit such copies, abstracts, or extracts respectively to be examined or compared with the originals, either by the said M. N., his appointees, heirs or assigns, or any other person or persons whom he or they shall require so to do, and shall and will use his and their best endeavors to preserve the same several deeds and writings, whole, undefaced and uncanceled in every respect ;

Provided always, and it is hereby agreed and declared between and by

Recital, that deeds were to be retained, and covenant to produce given.

Third testament, covenanting for production of deeds and attested copies.

Proviso for.

cessor of co-
venant.

the said K. L., party hereto, and the said M. N., that in case other property to which the said deeds, muniments, evidences and writings relate, shall at any time hereafter be sold and disposed of, and the said K. L., party hereto, his heirs or assigns, shall thereupon at his or their own proper costs and charges, cause and procure the purchaser or purchasers thereof to enter into a valid covenant with the said M. N., his appointees, heirs and assigns, to the like extent of the covenant lastly hereinbefore contained, by and on the part and behalf of the said K. L., party hereto, his heirs and assigns, to be observed and performed, then and in such case the said covenant lastly hereinbefore contained, shall cease and be void, except as to any breach of such covenant which may have been previously committed, and without prejudice to any action or other remedy in respect of such prior breach. **En witness, &c.**

Here follow the several schedules referred to, and the receipts for the consideration money, duly endorsed.

Mortgage
with two
forms.

5. A mortgage of a copyhold estate is effected by a conditional surrender, with a deed of covenants. The proviso, or condition, rendering the surrender void on repayment of the loan, is often contained in a deed entered into at the time the surrender is made, which deed is termed a *defeasance*. But this mode, Mr. Watkins advises,⁶⁹ should never be recurred to when possible to be avoided; because the surrender being absolute on the rolls, should the defeasance, (a separate instrument,) be lost, the proof of the condition might be difficult, and frequently impossible. Besides, the title to the lands should always appear on the court-rolls of the manor, and not be dependent on any private deeds or agreements. If a defeasance be entered into, it ought always, for this reason, to be entered on the rolls.

The following is a form of proviso:—

~~Provided nevertheless~~, and upon condition that if the said C. D., his heirs, executors, administrators, or assigns, shall and do well and truly pay, or cause to be paid, to the said A. B., his executors, administrators or assigns, the full sum of —*l.* of lawful money of Great Britain, with lawful interest for the same, on the — day of —, which will be, &c., without

(69) 1 Cop., p. 116.

any deduction or abatement whatsoever, for or in respect of any taxes, rates, charges, assessments or impositions whatsoever, then the above surrender to be void, else to be and remain in full force and virtue.

The mortgage transaction sometimes consists of the surrender and condition entered on the rolls; but, in practice, there should always be a deed, containing covenants for the title and for repayment of the money, as in the following precedent. No. 6 *post*, 223.

(V.)

A SURRENDER by way of MORTGAGE.

MANOR of —, in } **Be it remembered**, that on the — day Surrender.
the county of —. } of —, A.D. —, A. B. of —, in the county
of —, for the consideration mentioned, and in pursuance of the covenant
contained in an indenture bearing even date herewith, and expressed to be
made between the said A. B. of the one part, and C. D. and E. F., both of
— aforesaid —, of the other part, **hath** surrendered and yielded up, and
by these presents **hath** surrender and yield up into the hands of the lord of
the said manor, by the acceptance of —, deputy steward of —, chief
steward of the courts of the said manor;

First, **All** those several messuages, farms, or tenements, or parts thereof **Parcels**.
respectively, some of them formerly constituting parts of an ancient estate,
called —, and now commonly called by the several names of the —,
—, —, situate, lying and being in the several townships of —, —,
—, and —, in the said county, with the several outbuildings, closes of
land and hereditaments thereunto belonging, and in the schedule hereunder
written described by names or other designations and quantities; **And also**
all that messuage or manor-house and outbuildings, lately erected by the
said A. B. upon part of the said — estate, and called —, (subject never-
theless to a right, liberty and privilege, which have been granted to G. H.
and the said C. D. and E. F., their heirs and assigns, to and for them,
at any time or times, to enter into and upon such of the said closes of land
as lie between a reservoir called the — reservoir, and the — works,
for the purpose of opening and making, and from time to time cleansing
and repairing drains and channels for the purpose of conveying the water of
the said reservoir to the said — works, they making reasonable compen-
sation from time to time to the owner and occupier and occupiers of the
said closes of land, for the damage which shall be done thereby, and ex-
cepting hereout a plot of land, part of the said — estate, containing,—

a.—r.,—p., in customary measure, lately sold by the said A. B. to Y. Z. ;) And also all those several erections, edifices and buildings, with the land, ground, waters, fixtures, water-wheels, boilers, engines, machinery, vats, pipes, implements, and appurtenances thereunto belonging, and demised therewith, situate, lying and being in the said townships of — and —, and commonly called or known by the name of the —; the site of the said buildings and lands (including a portion of a field called the —, formerly parcel of the — estate, but which portion is now laid to and forms part of the — property), containing in statute measure,—a.,—r.,—p., or thereabouts; And also all that close, field, or parcel of land called —, being the portion not laid to the — property of the field originally known by that name, and parcel of the said farm or tenement, called —, the said portion of the said field called —, containing in statute measure,—a.,—r.,—p. of land, or thereabouts, and all other the messuages, buildings, lands, hereditaments, wheels, engines, machinery, implements, matters and things comprised in the surrender and indenture next hereinafter mentioned, and which said messuages, farms or tenements, called —, the said field called —, the said buildings and premises called —, with the machinery and implements belonging thereto, and a plot of land hereinafter described, part of —, are now in the possession of —, under a surrender and lease granted to him and to — (now deceased) thereof, with certain liberties and privileges, bearing date on or about the — day of —, A. D. —, for the term of — years, commencing as therein mentioned, at and under the yearly rent of —l., Together with the full benefit of all the rents, reversions, covenants, provisoes, agreements, matters and things, in or by the said surrender and lease respectively reserved and expressed or contained, and by or on the parts and behalves of the said lessees, their executors, administrators or assigns, to be paid, observed and performed, Together with full and free liberty, power and authority, to and for the said C. D. and E. F., their heirs and assigns, to convey the water from a spring in a close of land called —, part of an estate called —, now belonging to the said C. D., in the line and course in which the same is now conveyed, and through a plantation also belonging to the said C. D., into the reservoir belonging to the said —; and also full and free liberty, power and authority, to continue open, and repair when and as often as occasion shall be or require, the present drains and channels, for the purpose of conveying the said water in and through the lands of the said C. D., into the said reservoir, making a reasonable compensation for the damage which shall from time to time be done thereby; all which messuages, farms or tenements, lands, hereditaments and premises, hereinbefore particularly described, are of the yearly rent to the lord of the said manor of —l., being a proportionate part of —l., the entire rent of the — estate.

And secondly, All that plot, piece, or parcel of land or ground, as the same is now, or was some time ago, staked or fenced off from the remaining parts of two closes of land, called the — and —, situate, lying and being in — aforesaid, which said plot or parcel of land forms, and is used as part of a road or way leading from the — road to —, and the said plot or parcel of land is bounded on the west end thereof by another plot or parcel of land, formerly belonging to —, and forming other part of the said road or way; at the east end thereof, by lands part of the said — estate; on the north side thereof in part by lands and plantations formerly belonging to —; and in other part by a small strip of land which divides the same from such lands and plantations; and on the south side thereof by other parts of the said closes of land called the — and —, and by the plot or parcel of land next hereinafter described, and which said plot or parcel of land secondly described contains in width — yards, and in length — yards, and in the whole — superficial square yards of land or ground, or thereabouts, be the same more or less: and also all that other plot, piece, or parcel of land or ground, lately other part of the said close of land, called —, adjoining on the north side thereof to the said land used as a road, on the east side thereof to land part of — estate, and on the west and south sides thereof to other parts of the said close of land called —, and the last mentioned plot or parcel of land contains, in length, on the north side thereof along the said road — yards and — inches, and on the south side thereof — yards and — inches, and in depth backwards at the west side thereof — yards, — inches, and at the east side thereof — yards, — inches, and in the whole, — superficial square yards of land or ground, or thereabouts, be the same more or less:

And also all those several messuages, cottages or dwelling-houses, and other buildings erected and built, and now standing and being upon the said plots or parcels of land, or one of them, and called —, with the out-houses, offices, and appurtenances thereto belonging, and which said plots, pieces, or parcels of land or ground, are subject to the payment of the yearly rent or sum of —*l.* to the said G. H., his heirs and assigns, and subject to the covenants, clauses, provisoes, restrictions and agreements respectively reserved, mentioned, and contained in and by a certain surrender and indenture bearing date severally on or about the — day of —, A.D. —, and all which premises are of the yearly rent to the lord of the said manor of —, but the said messuages, farms or tenements, buildings and premises hereinbefore described, are hereby surrendered, subject to such liberties and privileges as have been granted or demised to the said — and —, by the surrender and lease of the — day of —, A.D. —, hereinbefore referred to.

And thirdly, a right of road, and of passing and repassing on foot, and with horses, carts and carriages, and otherwise, from a certain street in — called —, upon, over, and along a certain way or road, called the — road, running through certain closes of land in — aforesaid, belonging to —, called the — and the —, the said road being well and effectually repaired and fenced as directed in and by an indenture and deed of covenant referred to by the surrender next hereinafter mentioned, and which said road contains in width in the narrowest part — yards, and in length — yards, or thereabouts, be the same more or less, which said right of road is held under a surrender, bearing date on or about the — day of —, A.D., —, (with a plot of land therein described, from the said —, for a term of — years, subject to an apportioned yearly rent of —*l.*, part of a rent of —*l.* reserved by the same surrender, and the residue whereof is paid by the owner of the said plot of land and the buildings thereon) and subject also to the reservations and conditions in the same surrender contained, including a right for the said —, his heirs and assigns, and for the tenants and occupiers of certain estates belonging to him, called — respectively, and of the houses and buildings erected, or which shall be erected thereon, or on either of them, or on any part thereof, and for all and every other persons and person, by the leave or permission of the said —, his heirs and assigns, and of such tenants and occupiers respectively, or any of them, on foot and with horses, carts, carriages and otherwise, and for all purposes whatsoever, to pass and repass over and upon the said road, or any part thereof, to or from any place or places whatsoever, without making any compensation whatsoever.

And fourthly and lastly, all those several closes, closures, or parcels of land, (formerly part of an estate called —, but now forming part of the — estate,) situate, lying and being in the township of — aforesaid, and called or known by the several names of the —, —, —, and also all that —, and all those dwelling-houses and cottages, erections and buildings, erected and built, and now standing and being upon the said —, or some part thereof, which said close of land, called the —, was formerly stated to contain by admeasurement —*a.—r.—p.* of land of customary measure, or thereabouts, and the said four other closes of land were stated to contain in the whole by admeasurement —*a.—r.—p.* of land of the like measure, or thereabouts, and all the said closes and hereditaments lastly hereinbefore described, are of the yearly rent to the lord of the said manor of —, and also all that messuage or dwelling-house formerly called — but now called —, one barn, and other buildings, and the several closes, closures, pieces and parcels of land thereto belonging, formerly commonly called or known by the several names of the —, —, —, and two parts of the house

at the —, and stated to contain by admeasurement (including a part containing —r.—p. of the further — now belonging to the said G. H.) —a. —r. —p. of land of the like measure, or thereabouts, situate, lying, and being in the township of — aforesaid, and of the yearly rent to the lord of the said manor of —, which said closes, closures, or parcels of land, buildings, hereditaments and premises hereinbefore described, part of which was formerly a portion of the estate called —, and the remainder of which was called —, constitute now one estate and property called —, and are better known by the description following, (that is to say) All that messuage or dwelling-house, called by the name of —, situate, lying and being in the township of — aforesaid, and also all those several closes, closures, and parcels of land to the same belonging or usually occupied therewith, called or known by the several names of the —, —, —, and the plantation, containing in the whole in customary measure (but exclusively of the said part, containing —r.—p., of the —) —a. —r.—p., or thereabouts, be the same more or less, and also all that —, and all those dwelling-houses, cottages, and other erections and buildings erected and built and now standing and being upon the said closes of land, some or one of them, and also the south end of a seat or pew, marked — in — chapel, containing — inches in length, all which said messuages, farms, or tenements, lands, cottages, hereditaments and premises, were surrendered to the use of the said A. B., his heirs, executors, administrators and assigns, for the consideration and pursuant to the covenants expressed and contained in a certain indenture, bearing date on or about the — day of —, A.D. —, and expressed to be made between — and —, in the county of —, the above-named A. B. and I. J., of —, in the said county, and therein described to be the devisees in trust and executors named and appointed in and by the last will and testament of —, late of — aforesaid, deceased, of the first part, the said G. F. of the second part, the said C. D. of the third part, the said E. F. of the fourth part, K. L., therein described to be then of —, in the said county of —, of the fifth part, M. N. of —, in — aforesaid, of the sixth part, P. Q. of —, in the said county —, and the said K. L. and Q. R. of —, in the said county —, and S. his wife, of the seventh part, O. P. and T. his wife, of the eighth part, and the said A. B. of the ninth part, subject as therein and hereinafter mentioned; And to all which said hereditaments and premises hereinbefore described and hereby surrendered, or mentioned so to be, the said A. B. was duly admitted a tenant at a court held in and for the said manor, on the — day of the same month of —, And also all other the hereditaments (if any) mentioned and comprised in the said last-mentioned indenture, and in the surrender of even date, which was made in pursuance thereof;

General
words.

Together with all houses, outhouses, buildings, barns, stables, lands, commons, ways, roads, waters, watercourses, cawls, wears, dams, reservoirs, goiets, sluices, aqueducts, land covered with water, rights, easements, privileges and appurtenances whatsoever to the said hereditaments and premises hereinbefore particularly described respectively, or any of them, belonging or in anywise appertaining, or held, used or enjoyed herewith, or with any of them, or with any part thereof respectively (subject and except nevertheless as hereinbefore is particularly mentioned) ;

And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof ;

And all the estate, right, title, interest, inheritance, term and terms for years, trust, possession, property, possibility, claim and demand whatsoever, both at law and in equity, of him the said A. B., in, to, or out of the said hereditaments and premises hereinbefore described, and every of them (subject and except nevertheless as hereinbefore particularly mentioned) ;

Uses.

To the uses hereinbefore limited and declared, (that is to say) as, to, for, and concerning all and singular the hereditaments and premises firstly, secondly and fourthly, hereinbefore-mentioned and particularly described respectively, with their respective appurtenances, To the use and behoof of the said C. D. and E. F., their heirs and assigns for ever, by and under the rents, suits and services therefor due and of right accustomed, according to the custom of the said manor, But as to the said hereditaments firstly above described, subject to the right, liberty, and privilege above-mentioned to have been granted to the said G. H., C. D., and E. F., their heirs and assigns, and as to the same hereditaments, and the said hereditaments secondly hereinbefore described, subject to the above-mentioned surrender and lease of the — day of —, A.D., —, and the liberties and privileges thereby granted, and subject also as to the said hereditaments and premises secondly hereinbefore described, to the above-mentioned yearly perpetual rent of —*l.* ; And as to, for, and concerning the right of road, and other privileges and premises thirdly hereinbefore particularly described, To the use of the said C. D. and E. F., their executors, administrators and assigns, for and during all the residue and remainder now to come and unexpired of the said term of — years, then granted as aforesaid, subject to the payment of the above-mentioned apportioned yearly rent of —*l.*, and also subject to the rents, suits and services therefor due and of right accustomed, according to the custom of the said manor ; And as to all and singular the said hereditaments and premises hereinbefore described, and hereby covenanted to be surrendered, with their appurtenances, Subject to the proviso or condition for redemption herein-after contained (that is to say), Provided always, that if the said A. B., his heirs, executors or administrators, shall pay or cause to be paid unto the

said C. D. and E. F., or their assigns, or the survivor of them, his executors, administrators or assigns, the sum of ——*l.* sterling, with interest for the same, after the rate of ——*l.* for every 100*l.* for a year, on the —— day of ——now next, without making any deduction or abatement thereout whatsoever, then the said C. D. and E. F., their heirs, executors, administrators or assigns, shall, at the request and expense of the said A. B., his heirs, executors, administrators or assigns, re-surrender the said hereditaments and premises hereinbefore described and hereby surrendered, or intended so to, be with their appurtenances, to the use of the said A. B., his heirs, executors, administrators or assigns, or as he or they shall direct or appoint, free from all incumbrances made, done, or committed by them the said C. D. and E. F., their heirs, executors, administrators or assigns, in the meantime.

(THE SCHEDULE ABOVE REFERRED TO :)

(VI.)

DEED OF COVENANTS *to accompany the above SURRENDER.*

THIS Indenture, made the —— day of ——, A.D. ——, between Date.
A. B. of —— in the county of ——, of the one part, and C. D. and E. F., Parties.
both of ——, in the county of ——, of the other part;

Whereas the said A. B. is seised of and absolutely entitled to the copy- Recitals :
Mortgagor's
title;
hold hereditaments hereinafter described and covenanted to be surren-
dered;

And whereas the said A. B. is indebted to the said C. D. and E. F. Mortgagor's
debt to mort-
gagees.
in the sum of ——*l.*, which belongs to them jointly, on a joint account;

And whereas it has been agreed that payment of the said sum of ——*l.*, Agreement to
secure ;
with interest for the same, shall be secured to the said C. D. and E. F., their
heirs, executors, administrators and assigns, in the manner hereinafter ex-
pressed ;

Now this Indenture witnesseth, that in consideration of the Testatum.
Covenant to
surrender.
premises, he, the said A. B., doth hereby for himself, his heirs, executors
and administrators, covenant with the said C. D. and E. F., their heirs, exe-
cutors, administrators and assigns, that he, the said A. B., or his heirs,
executors or administrators, shall and will forthwith, at his or their ex-
pense, surrender into the hands of the lord of the manor of ——, of which
the said hereditaments hereinafter described, are parcel and held :—

First all, &c. Parcels.

And secondly, all, &c.

And thirdly, a right of passing and repassing, &c.

And fourthly and lastly, all, &c.

General
words.

Together with all and every the rights, easements, privileges, and appurtenances whatsoever, to the said hereditaments and premises, or any of them, belonging or in anywise appertaining, subject and except nevertheless as hereinbefore is particularly mentioned ;

And the reversions, remainders, rents, issues, and profits thereof ;

And all the estate, right, title, interest, inheritance, term and terms for, years, trust, possession, property, possibility, claim and demand whatsoever, both at law and in equity, of him the said A. B., in, to, or out of the said hereditaments and premises, and every of them, (subject and except nevertheless as hereinbefore is particularly mentioned :

Uses.

As the uses hereinafter limited and declared (that is to say), as, to, for and concerning all and singular the hereditaments and premises, firstly, secondly, and fourthly hereinbefore mentioned and particularly described respectively, with their respective appurtenances, To the use and behoof of the said C. D. and E. F., their heirs and assigns for ever, by and under the rents, suits, and services therefor due and of right accustomed, according to the custom of the said manor, But as to the said hereditaments, first above described, subject to the right, liberty, and privilege above mentioned to have been granted to the said G. H., C. D., and E. F., their heirs and assigns ; And as to the same hereditaments, and the said hereditaments secondly hereinbefore described, subject to the above mentioned surrender and lease of — day of —, A.D. —, and the liberties and privileges thereby granted, And subject also as to the said hereditaments and premises secondly hereinbefore described, to the above mentioned yearly perpetual rent of —*l.* ; and as, to, for, and concerning the right of road, and other privileges and premises thirdly hereinbefore particularly described, To the use of the said C. D. and E. F., their executors, administrators and ass'ns, for and during all the residue and remainder now to come and unexpired of the said term of — years, then granted as aforesaid, subject to the payment of the above-mentioned apportioned yearly rent of —*l.*, and also subject to the rents, suits, and services therefor due and of right accustomed, and according to the custom of the said manor ; And as to all and singular the said hereditaments and premises hereinbefore described, and hereby covenanted to be surrendered, with their appurtenances, Subject to the proviso or agreement for redemption hereinafter contained (that is to say), Provided always, and it is hereby agreed and declared between and by the said parties to these presents, that if the said A. B., his heirs, executors, or administrators, shall pay or cause to be paid unto the said C. D. and E. F., or their assigns, or the survivor of them, his executors, administrators or assigns, the sum of —*l.* sterling, with interest for the same, after the rate of —*l.* for every 100*l.* for a-year, on the — day of —, now next ensuing, without making any deduction or abatement thereout what-

Defeasance.

soever, then and from thenceforth they the said C. D. and E. F., their heirs, executors, administrators or assigns, shall and will, at the request and expense of the said A. B., his heirs executors, administrators or assigns, re-surrender the said hereditaments and premises hereinbefore described, and covenanted to be surrendered, or intended so to be, with their appurtenances, to the use of the said A. B., his heirs, executors, administrators and assigns, or as he or they shall direct or appoint, free from all incumbrances, made, done, or committed by them the said C. D. and E. F., their heirs, executors, administrators or assigns, in the meantime.

And the said A. B., doth hereby for himself, his heirs, executors, administrators and assigns, and every of them, covenant with the said C. D. and E. F., their heirs, executors, administrators and assigns, that he the said A. B., his heirs, executors, administrators or assigns, shall and will pay or cause to be paid unto the said C. D. and E. F., or their assigns, or the survivor of them, his executors, administrators or assigns, the sum of —*l.* sterling, with interest for the same after the rate aforesaid, on the days or times in the above-written proviso mentioned or appointed for payment thereof, without any deductions :

Covenants :
for repay-
ment of the
loan, and in-
terest thereon
in the mean-
time ;

And also that he the said A. B., now hath in himself good right, full power, and absolute authority to surrender and assure all and singular the said hereditaments and premises hereinbefore mentioned and hereby covenanted to be surrendered, or intended so to be, with their appurtenances, unto and to the use of the said C. D. and E. F., their heirs, executors, administrators and assigns, in manner and form, and subject as aforesaid, according to the true intent of these presents ;

Right to sur-
render ;

And further, that if default shall be made in payment of the said sum of —*l.* and interest, or any part thereof respectively, on the day or time in the above-mentioned proviso appointed for payment thereof respectively, that then, and from thenceforth, it shall be lawful for the said C. D. and E. F., their heirs, executors, administrators and assigns, into and upon all and singular the same hereditaments and premises, or any part thereof, to enter, and the same from thenceforth peaceably to have, hold, and enjoy, and the rents and profits thereof to receive and take, to and for their own use and benefit, without any lawful hinderance, eviction or interruption, of or by the said A. B., his heirs, executors, administrators or assigns, or any other person whomsoever (except and subject as hereinbefore particularly mentioned) ;

That mortga-
ges may
enter upon
default ;

And that free and clear of and from all charges and incumbrances whatsoever, (except and subject as aforesaid) ;

Freedom
from incum-
brances ;

And moreover that he the said A. B., his heirs, executors and administrators, and every other person whomsoever, claiming any estate, right, or interest, in, to, or out of the said hereditaments and premises, shall and will

For further
assurance ;

at any time or times, after default shall happen to be made of or in payment of the said principal money and interest, or of any part thereof respectively, upon the reasonable request of the said C. D. and E. F., their heirs, executors, administrators or assigns, but at the costs and charges in the law of the said A. B., his heirs, executors, administrators or assigns, make, do, acknowledge and execute, all such further and other lawful and reasonable acts, things, deeds, conveyances and assurances in the law whatsoever, for the further and more absolutely surrendering, assuring, and confirming all and singular the said hereditaments and premises hereinbefore described and hereby covenanted to be surrendered, or intended so to be, with their appurtenances, unto and to the use of the said C. D. and E. F., their heirs, executors, administrators and assigns, for ever freed and discharged from the proviso or condition hereinbefore contained for redemption of the same hereditaments and premises, and all other equity of redemption whatsoever, as by the said C. D. and E. F., their heirs, executors, administrators or assigns, or any of them, or their, either, or any of their counsel in the law, shall be lawfully and reasonably devised or advised and required.

To insure;

And also that he the said A. B., his heirs, executors and administrators, shall and will from time to time, and at all times hereafter, so long as the said principal money, or any part thereof, shall remain owing upon the security of the said hereditaments and premises, insure and keep insured in some respectable Insurance Office from loss or damage by fire, the said messuages, mills and other buildings, hereinbefore mentioned and hereby covenanted to be surrendered, or intended so to be, in the value thereof, in the names or name, and to the satisfaction of the said C. D. and E. F., or their assigns, or of the survivor, his executors, administrators or assigns; and that in case he the said A. B., his heirs, executors or administrators, shall at any time during the continuance of the said security, refuse or neglect to effect or to keep on foot any such insurance, that then and so often as it shall so happen, it shall be lawful for the said C. D. and E. F., their executors, administrators and assigns, or any of them, in like manner to insure the said messuages, mills, and other buildings, in such sum, and for such time, as they or any of them shall think proper; and that every policy of such insurance shall be in trust for the better securing the said C. D. and E. F., their executors, administrators and assigns, the payment of the said sum of —£. and the interest to grow due thereon, and subject thereto in trust for the said A. B., his executors, administrators and assigns, and the said A. B. doth hereby declare that the expense of effecting and keeping on foot any such insurance as aforesaid by the said C. D. and E. F., their executors, administrators or assigns, with interest for the same after the

rate aforesaid, shall stand charged upon, and be paid out of the said hereditaments and premises.

And it is hereby agreed and declared, that until default shall be made in payment of the said sum of —*l.* and interest hereby secured as aforesaid, or some part thereof, it shall be lawful for the said A. B., his heirs, executors, administrators and assigns, peaceably and quietly to have, hold and enjoy all singular the said hereditaments and premises hereinbefore mentioned and hereby covenanted to be surrendered, with the appurtenances, and receive and take the rents, issues and profits thereof, to and for his and their own use and benefit.

Peaceable
enjoyment
by mortga-
gor till
default.

Provided always, and it is hereby agreed and declared between and by the said parties to these presents, That if default shall happen to be made in payment of the said sum of —*l.*, or any part thereof, or of the interest thereof, or of any part thereof respectively, at the day or time on which the same are respectively hereinbefore appointed and covenanted to be paid as aforesaid, contrary to the true intent and meaning of the above-written proviso, and the said C. D. and E. F., or their assigns, or the survivor of them, his heirs, executors, administrators or assigns, or any of them, shall have given or delivered to the said A. B., his heirs, executors or administrators, or left for him or them at his or their usual place of abode, notice in writing for the payment of the said sum of —*l.* and interest, or so much thereof respectively as shall be then due and owing, and six calendar months shall have elapsed from the delivering or leaving of such notice without such payment being made; then and in such case, and at any time or times thereafter, although no advantage shall have been taken of any previous default, it shall be lawful for the said C. D. and E. F., or their assigns, or the survivor of them, his heirs, executors, administrators or assigns, or any person or persons to whom they or he shall transfer this security, his, her and their heirs, executors, administrators and assigns, to sell and dispose of the said hereditaments and premises hereinbefore mentioned and hereby covenanted to be surrendered, or intended so to be, or any part or parts thereof, either together or in parcels, and by public auction or private contract, or partly by public auction and partly by private contract, and either subject or not subject to such conditions of sale restrictive as to the title, or evidence of title to be deduced, as they or he shall think fit, for the best price or prices in money, which, in their or his judgment, can be reasonably obtained for the same, with liberty to buy in the said hereditaments and premises, or any part or parts thereof, at any such auction or auctions; and to rescind any contract or contracts for sale thereof, and afterwards to resell the same hereditaments and premises by public auction or private contract, without being responsible for any loss or diminution of price at such resale,

Proviso for
sale after due
notice.

and to enter into, make and execute all such contracts, deeds and assurances as may be deemed expedient for the purposes aforesaid, and to receive the monies to arise by such sale or sales, and also, on granting any such lease or leases, and upon receipt thereof respectively, to sign and give proper receipt or receipts for the same, which receipt or receipts of the said C. D. and E. F., or their assigns, or of the survivor of them, his heirs, executors, administrators or assigns, shall effectually exonerate and discharge any and every purchaser of the said hereditaments and premises, or of any part or parts thereof, from the money therein expressed to be received, and from all liability whatsoever in respect of any loss, misapplication, or nonapplication thereof; and also, from all obligation to enquire whether any such default as aforesaid shall have been made, or whether any such notice as aforesaid shall have been given, or whether any money shall be then due or owing on the security of these presents; and by and out of the money to arise by such sale or sales, to retain to and reimburse themselves and himself all such costs, charges, and expenses as they or he shall or may expend or be put to in or about the making of such sale or sales, or by reason of the non-payment, or the procuring payment of the sum of —£, and interest, or any part thereof respectively, or in anywise relating thereto; and also, all monies paid by them or him for effecting or keeping on foot any such insurance against fire as aforesaid, with interest for the same as aforesaid; and from and after payment and satisfaction thereof respectively, to retain to and reimburse themselves and himself the said principal sum of —£, and all interest which shall have become due on account thereof, or so much thereof respectively as shall then remain due and owing, and to pay the residue and surplus of the money to arise by such sale or sales to the said A. B., his executors, administrators or assigns, as part of the personal estate of the said A. B.

Covenant to
join in sale.

And the said A. B. doth hereby, for himself, his heirs, executors and administrators, covenant with the said C. D. and E. F., their heirs, executors, administrators and assigns, That he the said A. B., his heirs, executors or administrators, (if required), shall and will join in any such sale or sales as aforesaid; and execute the several deeds, conveyances, assignments and assurances of the said several premises, to the purchaser or purchasers thereof, or of any of them; and enter into all usual and reasonable covenants with such purchaser or purchasers, his, her and their heirs, executors, administrators and assigns, for the estate, title, possession and further assurance of the said premises, or such of them as shall be so sold, or do any other reasonable act or acts for confirming such sale or sales.

Put shall not
be actually
necessary.

Nevertheless, it is hereby agreed and declared, that the joining of the said A. B., his heirs, executors or administrators, in any such sale or sales,

conveyance or conveyances aforesaid, shall not in anywise be necessary to perfect the title of the purchaser or purchasers of the said parties, or any part thereof, the same being intended only for the further satisfaction of such purchaser or purchasers.

Provided always, and it is hereby agreed and declared, that the power of sale hereinbefore contained, shall not prejudice or affect the right of the said C. D. and E. F., their heirs, executors, administrators or assigns, to foreclose the equity of redemption of and in the said hereditaments and premises, or any part thereof.

Power of sale
not to prejudice
foreclosure.

And the said C. D. and E. F., hereby declare, that the said sum of —£—, hereby secured, belongs to them jointly, in a joint account; and that if either of them should happen to die before the same principal sum shall have been paid to them, the receipt of the survivor of them, or of his executors, administrators or assigns, shall be a sufficient discharge for the said sum of —£—, and for all interest thereof, or of any part or parts thereof respectively. **In witness, &c.**

Receipt of
surviving
mortgagee
sufficient
discharge.

(SCHEDULE AND ATTESTATION, &c.)

Upon the repayment of the loan the surrender is at an end, and the surrenderor-mortgagor is in possession *in statu quo*, without any re-admission or fine.⁷⁰ If the surrenderee-mortgagee be admitted, and the money be not repaid at the time fixed, his estate is absolute, so that, should the mortgage be afterwards satisfied, the mortgagor must be re-admitted and pay a fine. A mortgagee cannot be compelled to be admitted, even after condition broken, unless there be a special custom in the manor to such effect. If the conditional surrenderee have not been admitted, the practice is, on payment of the money, for the mortgagee to give a warrant to the steward to vacate the surrender, and thereupon the surrender is at an end.

The following is a form of a warrant to vacate :—

I, C. D., of &c. hereby acknowledge to have this day received of A. B., &c., the sum of —£—, in full satisfaction and discharge of all principal and interest secured to me by a conditional surrender made by the said A. B., of certain copyhold premises, by him then held of the manor of —, to

(70) *Simonds v. Lawnd*, Cro. Eliz. 239.

my use, at a court held on the — day of — last, and therefore I request and authorise you, as steward of the said manor, to vacate such surrender accordingly. Witness my hand, &c.

To E. F.

C. D.

Steward of the manor of —,
in the county of —.

Sometimes the acknowledgment is made in court, when the surrender is found in the usual way, and the entry thus made :—

And now, at this court, came the said C. D., in his proper person, and acknowledged to have received full satisfaction and payment of the said sum of —l., and all interest for the same, according to the form of the said surrender, And thereupon the said A. B. and C. D. prayed that the said surrender might be vacated ; And the said surrender is vacated accordingly.

If it be made out of court, before the lord or steward, say,

Be it remembered that on the — day of — the within-named C. D. came before me — (lord or steward of the manor of —, *as the case may be*) ; and acknowledged to have received of the within-named A. B. all principal and interest secured to him by the within surrender : and requested that the said surrender be vacated accordingly.

Taken, &c.

C. D.

E. F., lord or steward, of, &c.

This memorandum should be endorsed on the copy of the surrender, and signed by the lord or steward, and the mortgagee should acknowledge satisfaction : and at the next court it should be presented ; thus,—

And also at this court it is certified by the said steward, and thereupon the homage present, that out of court, and since the last court, C. D., one of, &c., came before him the said steward, in his proper person, and acknowledged, &c., (*as in the memorandum*). Of which acknowledgment and request a memorandum was duly made and signed by the said C. D. and the said steward, and now exhibited in open court ; therefore the said surrender is accordingly vacated and annulled.

Upon the conditional surrenderee or mortgagee being

admitted, he is then the lord's tenant, and the mortgagor may, before condition broken, release to him the benefit of the condition, and after condition broken, his equity of redemption ; and no fine in either case will be due to the lord.

So long as the transaction between the mortgagor and the mortgagee rests in covenant, if the mortgagee assign his equitable interest by deed, and the mortgagor surrender to the assignee, he may compel the lord by *mandamus* to admit him without a double fine.⁷¹

6. An equitable interest in copyholds is not the subject of surrender, except in the instance of a surrender for the purpose of barring an entail ; but it is assignable. The assignee of an equitable estate, on taking a surrender from the person in whom the legal copyhold interest is vested, may compel an admission upon the payment of a single fine.

Equitable
copyholds
transferred
by assign-
ment.

7. As to the presentment of surrenders, the Commutation and Enfranchisement Act, 4 & 5 Vict., c. 35, § 89, enacts, “ that every surrender, and deed of surrender, to be accepted by the lord, and every will and codicil, a copy whereof shall be delivered to the lord, to the steward, or his deputy, either at a court to be holden without the presence of homagers (under § 86), or out of court, and every gift and administration by the lord or the steward, or his deputy (under §§ 87 and 88), shall be forthwith entered on the rolls of the manor ; and that every such entry shall for all purposes be deemed and taken to be an entry made in pursuance of a presentment at a court by the homage assembled thereat. A presentment shall not now be essential to the validity of any administration (§ 90).

Presentment
abolished.

When a surrender was taken out of court, the present-

(71) *Rex v. Hendon*, 2 T. R. 484.

ment, by the general custom of manors, was to be made at the succeeding general court, or, if there were a special custom for it, at the second or third court day, or within a year, or alternatively at the next court, or at the next court after a year.⁷²

The surrender, and every other document relating to the title, on being presented in court, should have been endorsed thus :—" presented and enrolled at a court held for the manor of —, the — day of —," and then undersigned by at least two of the homage. But presentments are now, as we have seen, abolished.

Admittance
defined.

8. An admittance is the lord's acceptance of a person into the tenancy. Until admittance, a surrenderee of copyholds has not the *legal* title to his estate, although the surrender is the substantial part of the conveyance, and the admittance is simply matter of form. Should a purchaser die before surrender, his heir at law is entitled to admittance as by descent. Before admittance, a surrenderee cannot surrender to another, nor will his subsequent admittance render a prior surrender by him valid by relation, although as a general rule, an admittance defeats all mesne acts, from the date of the surrender. The heir of an unadmitted surrenderee, and the devisee of an unadmitted devisee, can have no legal title before admittance.

The lord is not bound to admit incapacitated persons, as aliens, outlaws, &c., or persons not capable of performing the customary services, as corporate bodies, or to admit a tenant according to the express terms of the surrender, when it is informal or prejudicial to his interests.

The customary form of admission should be strictly pursued ; the ordinary symbol of admission is a rod, verge, or wand, whence copyholders are frequently called "tenants by the verge."

No notice whatever can be taken by the lord of a simple covenant to surrender, though he is bound to admit the assignee of a surrenderee under a surrender made to him by the covenantor;⁷³ but the assignee of a surrenderee, Mr. Serjeant Scrivens conceives,⁷⁴ cannot compel admission, without satisfying the lord such fine as he would have been entitled to by the admission of the surrenderee; especially when there is a custom in the manor, by which the lord might compel the surrenderee to come in and be admitted.

The admission of one joint-tenant is the admission of all the rest, and if one die, or release to the others, no new admittance is necessary. Coparceners, being one heir, a single admission and one set of fees suffice for all; the customary heir of a deceased copartner must be admitted, and so must a coparcener, who is a surrenderee of the others. Tenants in common have several estates, and must, therefore, be severally admitted. The admission of the husband is not necessary, when he is seised in right of his wife; and if the wife took by descent, the husband may even enter in her right before her admittance. As to curtesy or freebench, if it be of the whole of the deceased wife's or husband's estate, the admission of the husband or wife is, as we have already observed, unnecessary, for it is then but a continuation of the original estate; but if it be but of a portion of the estate, then admission is necessary. The executor or administrator of a deceased tennor must be admitted.

The admittance does not of itself constitute possession, but only gives the party admitted the means of obtaining possession, provided he have a right to it.

If there be any variation between the surrender and admittance, the estate will be according to the surrender, which confers the title.

(73) *The King v. Lord of Manor of Hendon and his Steward*, 2 T. R. 483.

(74) 1 Cop. 292.

How compelled.

9. The Court of Queen's Bench will grant its prerogative writ of *mandamus* to compel the lord of a manor to admit a person who can shew a colorable title to a copyhold estate ; or, to compel him to accept a partial or full surrender from a copyholder ; but it will not compel the lord to admit an heir at law, by reason of its inutility, as the heir has as good a title without admittance as with it, against all the world other than the lord.⁷⁵

A court of equity will also give relief in such cases.

The lord's fine on admittance.

10. Upon admittance, a fine becomes due to the lord, unless there is a special custom to the contrary. This fine, as well as the steward's fees, are payable by the purchaser ; and even a covenant to surrender copyholds, at the costs of the vendor, is not broken by the non-payment of this fine, the title being perfected by admittance.⁷⁶

The admission fine is *primâ facie* uncertain and arbitrary, unless a special custom fix it ; it must, however, be reasonable, and two years' improved value of the land, deducting quit rents, but not land tax, is the full extent which the courts will allow the lord to take in the exercise of this arbitrary power. On the death of a surrenderee before admission, the lord must admit his heir on payment of a simple fine only ;⁷⁷ but if the heir of a copyholder die before admission, his heir or devisee could not compel admission, except on payment of a double fine.⁷⁸ Without a special custom for it, the remainder-man is not liable on the death of the tenant for life, to pay a fine : but the heir or surrenderee of a reversioner or remainder-man, as well as the surrenderee of a particular tenant, must be admitted and pay a fine.

If a copyholder intend that the estate shall be sold at

(75) *The King v. Rennett*, 2 D. & E. 197.

(76) *Graham v. Sime*, 1 East, 634.

(77) 1 Scriv. Cop. 341.

(78) *Ib.* 342.

his death, he may save a double fine by giving a power of sale to his executors, for the donee of a power is not admitted, but the appointee only, upon whose admittance a fine is due; if, however, he devise the copyhold to trustees, upon trust to sell, then the trustees must themselves be admitted; a trustee, and not the *cestui que trust*, is the person to be admitted the lord's tenant.

If the fine be certain, the tenant should come prepared to pay it, but the lord cannot refuse admittance because the fine is not tendered to him. When the fine is uncertain, the practice is to fix a reasonable day and place of payment.

11. The steward's fees are regulated entirely by custom, and a customal, or list of fees to be taken under every circumstance, is generally handed down from steward to steward. When the steward charges enormously, the copyholder may bring an action on the case, to recover the excess, and it has been suggested that an indictment would lie for extortion *colore officii*. The fees of the steward of a manor who is a solicitor, but acts in the character of steward only, are not taxable under 6 & 7 Vict., c. 73, § 37.⁷⁹ In transactions where these fees are large or numerous, a special agreement is generally made between all parties.

12. Voluntary grants are now made by lords of manors of those estates which have been demised or demisable immemorially by copy, whenever they determine, become forfeited, or escheat, and so return to the lord's possession. No person can destroy the custom of granting copyhold land, unless the fee simple of the manor be vested in him. In voluntary grants made by the lord himself, the law does not respect the quality of his person, for the copy-

(79) *Allen v. Aldridge*, 5 Beav. 401.

hold is derived from the custom, and not from the lord or his estate. A steward of a manor may make voluntary grants, for he represents the lord to all intents.

Mr. Watkins⁸⁰ defines a grant to be “a gift of the lord to another person of a certain portion of his demesnes, to be held by copy of court-roll, at the will of the lord, according to the custom of the manor, under the usual services and returns.”

Wills, and
the provisions
of 1 Vict.,
c. 26.

13. A will of copyholds operated as a declaration of uses of the surrender, which was rendered necessary in every case of devise. Copyholds did not pass under a general devise of “all real estate,” unless there were other words or circumstances in the will, showing an evident, or creating a constructive, intention on the part of the testator to include them in the devise, for copyholds were not within the ancient Statute of Wills (34 & 35 Hen. VIII., c. 5), and therefore, strictly speaking, they were not, in their nature, of a testamentary disposition.

The modern Statute of Wills (1 Vict., c. 26), enacts, (§ 3), “that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not

have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry, and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of the will."

The 4th section enacts, "that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall

be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator : Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled, or claiming to be entitled to such real estate in consequence of such will, shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate ; and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will ; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid."

And section 5 enacts, "that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court-rolls

of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court-rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate; and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent."

14. Copyholds are excepted out of the Register Acts of 2 & 3 Anne, c. 4, for the West Riding of Yorkshire; the 6 Anne, c. 35, for the East Riding of Yorkshire, and the town and county of the town of Kingston-upon-Hull; the 8 Geo. 2, c. 6, for the North Riding of Yorkshire; and the 7 Anne, c. 20, for Middlesex.

Copyholds
not within
the registry
acts.

Upon this subject Sir Edward Sugden says, "This exception is general; and it may be thought that no deed relating to a copyhold estate need be registered. No effectual lien can be created on the land without its appearing on the court-rolls. A lease, indeed, once created by licence, is a common-law interest, and may be assigned without the assignment appearing in the court-books; but this is a very inconsiderable mischief, as the license must appear on the court-rolls. Indeed, in some few manors, copyhold tenants may lease without license, and this is a good custom. But still in all cases, although the interest granted by the lease is a common-law interest, yet the *estate* remains copyhold, and appears

to be within the exception in the act. However it is *certainly advisable* to register such leases of copyhold estates as, if the estates were freehold, would require registry.⁸⁴

Partition.

15. The question whether the Court of Chancery have any jurisdiction to decree a partition of copyholds, has been set at rest by the Commutation Act, 4 & 5 Vict., c. 35. Before this act, however, where two joint tenants agreed to make a partition, the court would enforce the agreement.⁸⁵ The 85th section of the statute enacts:—

“ ‘ And whereas it is expedient that facilities should be afforded by courts of equity to parties desirous of obtaining a partition of their lands of copyhold or customary tenure, but doubts are entertained whether by the practice of such courts the same can now be obtained ;’ be it enacted and declared, that from and after the passing of this act, it shall be lawful for any court of equity, in any suit to be thereafter instituted therein for the partition of lands of copyhold or customary tenure, to make the like decree, for ascertaining the rights of the respective parties to the suit in such lands, and for the issue of a commission for the partition of the same lands, and the allotment in severalty of the respective shares therein, as, according to the practice of such court, may now be made with respect to lands of freehold tenure.”

(84) 3 Segd. p. 365.

(85) *Bolton v. Ward*, 4 Hare, 530.

CHAPTER IV.

THE MODE OF HOLDING COURTS.

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| 1. The precept and notice for a customary court-baron.
2. The usual business transacted.
3. The charge.
4. Proclamation of a tenant's death.
5. A surrender in court.
6. An admittance. | 7. Practice as to seizure.
8. An afferment.
9. Conclusion of the business.
10. A special court.
11. The facilities given to lords or their stewards by statute. |
|--|---|

These are the practical proceedings for calling a customary court-baron.

1. The steward of the manor issues his precept to the bailiff, thus :—

The Manor of —, in } To —, bailiff of the said
the county of — } manor.

The precept
and notice
for a custo-
mary court-
baron.

These are to require you to summon and give notice to the several and respective customary tenants of the said manor of —, personally to appear at a customary court-baron, to be holden for —, lord of the said manor, on — the — day of — at — o'clock in the forenoon, at the usual and accustomed place, being the —, then and there to do their respective suit and services, and pay their respective rents due to the lord of the manor of — aforesaid: and these are also further to require you to give notice of the said court to all other persons in any-wise concerned in the business thereof, in order that they

may appear at the time and place above mentioned, and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this — day of —, in the year of our Lord—.

(Steward's signature),

L. S.

Upon the receipt of this precept, the bailiff issues the following notice :—

The manor of ——— } Notice is hereby given to all
in the county of — } persons whom it may concern,
that a general customary court-baron of — will be
holden for the said manor of —, on — the — day
of —, at — o'clock in the forenoon, at the usual and
accustomed place, being—, when and where all customary
tenants of the said manor are required to attend and to
perform their suit and service, and pay their respective
rents due to the lord of the said manor. Dated this —
day of — in the year of our Lord —

(Signed,) ——— bailiff.

Should there be any freeholders tributary to the manor, the word “customary” should be omitted, both in the steward's precept and bailiff's notice.

The usual
business
transacted.

2. The following is the usual business transacted at these courts :—

On the court day, the steward attends with the rolls of the manor, and a minute book in which to record the business done. Should it be the first court-day held by the steward, he should read his appointment to the assembled tenants.

The bailiff opens the court by proclamation :—

“O yez! All manner of persons that owe suit and service to the customary court-baron of —, here this day to be holden for the manor of —, or shall have been

summoned to appear at this court, draw near and give your attendance, every tenant answering to his name as he shall be called."

The suit-roll is then called over, and against the name of the tenants who appear "*ap.*" is written, and "*ess.*" against such as are duly essoigned or excused; after this, the homage are sworn, their names being entered in the minute-book, with "*sw.*" marked against them. This is the form of oath:—

"A. B., You, as foreman of this homage, shall enquire and true presentment make, of all such things as shall be given to you in charge, and of all such other matters as shall come to your knowledge, presentable at this court; and this you shall do without fear, favor, affection, hatred or malice, to the best of your understanding. So help you God.

"C. D., E. F., G. H., and I. J., (*and so four at a time according to their seniority of tenancy,*) The like oath which A. B., your foreman, hath taken on his part, you and every of you, shall well and truly observe and keep, on your respective parts. So help you God."

3. After the homage are duly sworn, the steward The charge. charges them.

The charge is usually a brief detail of the business to be transacted as to the transmission of copyholds; as to their duty to present the death of any tenant, that the lord may have his heriot, and that the estate of any deceased copyholder may be proclaimed; and any acts of forfeiture.

The full charge is given when there are any new tenants. It consists of these particulars:—

(1.) Reminding the homage that it is their duty to present any deaths since the last general court, and any customary heirs.

(2.) Impressing upon them the necessity of their in-

forming themselves of all transfers and alienations by any of the copyholders.

(3.) The necessity for their inquiring after any leases of the copyhold property without the lord's license.

(4.) Whether any of the copyholders have been convicted of treason or felony, or been outlawed for any capital crime, or have committed voluntary or permissive waste, or have enclosed land, or removed or abated ancient enclosures or land-marks.

(5.) Whether any incapacitated persons have purchased any of the copyholds.

(6.) Or any encroachments on the lord's waste have been made, and charging them to enquire of all other things concerning the lord's interest, and also the particular business to be then and there transacted.

The homage are generally prepared with their presentments; but, if not, they now retire to consider them. The steward then enters minutes of all the proceedings.

Proclamation of a tenant's death.

4. When a tenant's death is presented, the bailiff notifies it by proclamation:—

“If any one can make any title or claim to the copyhold tenements holden of this manor, whereof —, lately died seised, let him appear, and he shall be admitted, and in default the same will be taken into the hands of the lord for want of a tenant: this is the proclamation.”

This proclamation is made at three successive general courts, if no claimant appear in the meantime.

The bailiff then notifies the surrenders, where there exists a custom compelling the admissions of surrenderees:—

“— [*the surrenderee*] come into court and be admitted to the copyhold tenements holden of this manor, and surrendered to your use by—, or the same will be seised into the lord's hands.”

5. When a surrender is made in court, the surrenderor ^{An admittance.} signs a memorandum of the proposed surrender being made on a sale, mortgage or otherwise, and the amount of the consideration (if any,) that it may appear on the court rolls, by which the amount of the stamp duty is to be regulated. 48 Geo. III., c. 149. 13 & 14 Vict., c. 97. The surrenderor then holds one end of a rod or other symbol, and the steward holds the other, saying :—

“You surrender into the hands of the lord of this manor, by my hands and acceptance by the rod, All &c., with the appurtenances, and all your estate and interest [*if so*] therein, to the use of — and his heirs for ever, [*or as the case may be,*] according to the custom of this manor.”

If the surrender be conditional by way of mortgage, this is added :—

“But on the express condition that this surrender is to be void, on payment to the said — of £—, and lawful interest for the same, on the — day of — next, [*as the case may be.*”]

If a *feme covert* join in the surrender, she must be examined by the steward apart from her husband, as to her voluntary consent to the surrender, 3 and 4 Wm. IV., c. 74, §§ 77, 79, and 90.

6. When a claimant presents himself for admittance, ^{A surrender in court.} the steward, upon being satisfied as to his right and title, holds one end of the rod, and the claimant the other, saying :—

“The lord of this manor, by me his steward, doth admit you tenant to the copyhold tenements holden of this manor, of which — lately died seised, [*or,* which have been surrendered to your use at this court by — ; *or,* which were surrendered by A. B. to your use, on the — day of —.] And this is to hold to you and your heirs [*or, as the case may be*] at the will of the lord, by the

accustomed fine, heriot, rents and services; in token whereof I deliver to you this rod."

The fines and fees are then paid or arranged, and the fealty respited.

Practice as
to seizure.

7. If three proclamations have been made as to any copyhold tenement, or if the party entitled to administration have been served personally with a notice to appear at the court, and no one attend, the steward issues a precept to seize the property in the following form:—

"The manor of——in } To —— bailiff of the said
the county of —— } manor.

"Whereas public proclamation hath been made at three consecutive general courts-baron, holden for the said manor, on the —— day of ——, the —— day of ——, and the —— day of ——, for [any person or persons claiming title to the copyholds, or customary lands and hereditaments, lying within and holden of the same manor, of which —— lately died seised, to come into court and be admitted thereto, and forasmuch as no person thereupon applied and claimed to be admitted to the said lands and hereditaments:—It is commanded and ordered that you —— do seize, and you are hereby authorized and required to seize into the hands and for the use of the lord of the said manor, all and singular the said customary or copyhold lands and hereditaments of which the said —— so died, seised, *in the meantime, and until some person or persons shall appear and make good his or their claim to be admitted tenant or tenants thereof:*] And you are hereby also commanded to make your return to this precept at the next general court-baron to be holden for the said manor. Given under my hand and seal, this —— day of ——, A. D. ——"

(Steward's signature)

L. S.

When a surrenderee, who is compellable by the custom to be admitted, neglects after the three proclamations to appear, the clauses within the brackets in the above precept are omitted, and the following words are inserted:— “ ——— to come in and be admitted by virtue of a certain surrender made &c., by ——— of [*describe the premises*]; and forasmuch as the said ——— did not come to take up &c., it is commanded and ordered that you, &c.”

Upon this precept the bailiff endorses the following return:—

“ I do hereby certify that by virtue of the within precept, I did this day, in the presence of ——— and ———, copyhold tenants of the within-mentioned manor, seise the within-mentioned lands and tenements into the hands and for the use of the lord, until &c., as commanded by the same precept. Witness my hand, this ——— day of ———, A. D. ———”

(Bailiff's signature).

The above precept is only to seise *quousque*, *i. e.* until the heir claim, or the surrenderee come to be admitted; but when an absolute seisure by custom is to be made, the words in italics are to be omitted. The precept should always recite the act that produces the forfeiture, according to the fact.

A copyholder, before he can bar an estate tail, must first be admitted tenant (if not already admitted), and then surrender to the particular uses, which he may desire.

After the transaction of this business, the bailiff proclaims thus:—

“ Oyez! If any person will enter any plaint, let him come into court, and he shall be heard.”

The 3 and 4 Wm. IV., c. 27., in its demolition of technical actions and writs, has left only a plaint for freebench in this court.

An affeer-
ment.

8. Any amercement is now recorded after being affeered by two copyholders, who are thus sworn:—

“You and each of you shall well and truly affeer and affirm the several amercements here made and now to you remembered; you shall spare no one through fear, favor, or affection, nor enhance any one from hatred or malice, but shall impartially act herein; so help you God.”

Conclusion
of the
business.

9. After this, licenses from the lord are settled and granted.

All the business having been disposed of, the steward reads over the heads of the several entries in the minute-book to the homage, and at the end is written—“We present this as our verdict;” which is signed by all the homage. The court is then dissolved by proclamation:—

“Oyez! all manner of persons who have appeared at this customary Court-Baron of —, have leave to depart hence; keeping their day and hour on a new summons.”

A special
court.

10. It is frequently found necessary to hold a special customary court-baron to transact some one particular business only; the mode of procedure is much the same, but it is then usual to summon two or three homagers merely.

The facilities
given to lords
or stewards
by statute.

11. The 4 & 5 Vict., c. 35, gives the following powers to lords of manors or their stewards:—by § 86 it enacts—

“That, after the thirty-first day of December, one thousand eight hundred and forty-one, it shall be lawful for the lord of any manor, or his steward, or the deputy of such steward, to hold a customary court for such manor, notwithstanding at the time of holding the same there shall not be any person who shall hold lands of such manor by copy of court roll, and also notwithstanding, if there shall at the time of holding such court be any person or persons who shall hold lands of such manor by copy of court

roll, there shall not be any such person present at such court, or there shall not be more than one such person present at such court; and every court so holden shall be deemed and taken for all purposes whatsoever to be a good and sufficient customary court: Provided always, that no proclamation made at any court so holden shall affect the right, title, or interest of any person not present at the same, unless notice of such proclamation having been made shall be duly served, within one month after such meeting shall have been holden, on the persons whose right, title, or interest may be affected by such proclamation."

Section 87 enacts, "that after the thirty-first day of December, one thousand eight hundred and forty-one, it shall be lawful for the lord of any manor, or his steward, or the deputy of such steward, to grant, at any time and at any place, either within or out of such manor, and without holding a court for such manor, any lands, parcel of such manor, to be held by copy of court-roll, or according to the custom of the said manor, which such lord shall for the time being be authorized or empowered to grant out to be held by copy of court-roll, or according to such custom, so nevertheless that such lands be granted for such estate only, and to such person only, as such lord, steward, or deputy shall for the time being be authorized or empowered to grant the same."

Section 88 enacts, "that after the thirty-first day of December, one thousand eight hundred and forty-one, it shall be lawful for the lord of any manor, or his steward, or the deputy of such steward, to admit, at any time and at any place, either within or out of such manor, and without holding a court for such manor, any person as tenant to any lands, parcel of such manor, to be held by copy of court-roll, or according to the custom of such manor, to and for which such person shall for the time being be entitled to be admitted."

CHAPTER V.

THE FORFEITURE, EXTINGUISHMENT, AND SUSPENSION
OF COPYHOLDS.

- | | | |
|---|--|---|
| 1. Causes of forfeiture. | | 4. Who may act upon, or dispense with,
a forfeiture. |
| 2. Who are incapable of committing acts
of forfeiture. | | 5. Extinguishment and suspension. |
| 3. Presentment of a forfeiture. | | |

SINCE copyholders hold at their lord's will *secundum consuetudinem manerii*, any act done by them, incompatible with the copyhold interest as established by custom, will operate as a forfeiture of their estates.⁸⁶

Causes of
forfeiture.

1. The following acts operate a forfeiture of a copyholder's estate :—

If a surrenderee or customary heir do not come to be admitted on due proclamation, it will be a forfeiture of his estate, either *quousque*, *i. e.* to retain the profits of the

(86) The nature of forfeiture is thus explained by Watkins (1 Cop. c. viii.) :—
As the copyholder originally held strictly at the will of the lord, and is still regarded by the law as holding at will, in cases where the custom of the manor has not restricted that will and protected the estate of the copyholder, so, if the copyholder does any act incompatible with the relation in which he stands as tenant—if he denies his dependency, or refuses to comply with the terms of the grant—the law deems it a determination of the will by which he holds; and the estate shall return to the lord who granted it. The copyholder, indeed, is not now dependent upon the caprice of his lord; the law and the custom of the particular manor of which he holds, have now, in many respects, protected and established his estate. But then he can only claim the protection of custom while he complies with its dictates. If he

estate until he be actually admitted, or absolute, according to the custom.

Previous to 8 & 9 Vict., c. 106, if a copyholder had executed a feoffment, with livery of seisin, which then amounted to a disseisin, the lord may have claimed his estate as forfeited; but by § 4 of this statute, feoffments have no longer any tortious operation, and they now simply transfer so much interest or estate as the feoffer may possess, and all beyond this is null and of no effect: they are, in short, innocent conveyances.

Any alienation contrary to the custom operates a forfeiture.

If a copyholder, without the lord's license, grant any kind of lease not warranted by the custom, it will be an immediate forfeiture. A lease, however, for one year, is warranted by the general custom of the realm; but a lease for one year, excepting the last day, and so from year to year, excepting the last day in every year, as long as the copyholder lives, is a lease for more than a year, and is, therefore, a forfeiture. It is a mere device to avoid the forfeiture. But a lease for one year, according to a custom and a covenant for enjoyment *de anno in annum*, during ten years, is not a demise for more than one year, and, consequently, no forfeiture.⁸⁷

The 4 & 5 Vict., c. 35, § 92, recites that "whereas by the custom of certain manors the lords are restrained from granting licenses to their tenants to alien their ancient tenements otherwise than by entireties; be it enacted, that from and after the passing of this act it shall be law-regulates not his conduct by the rules which that custom has prescribed, he is not entitled to its favor. If he transgresses the customs of the manor, the customs of the manor can no longer support his estate. While he performs his services, and returns and fulfils the duties of his tenancy, the law interposes in his behalf, and controls the will of his lord; but the law cannot countenance him in doing wrong. If he obeys not the law, the law may withhold its protection.

(87) Co. Litt. 59 a, n. 4, and see 1 Scriv. Cop. 436, *et seq.*

ful for any tenant of any such manor, by and with the licence of the lord of the manor, or the steward thereof, (which licence such lord is hereby authorized to give, or to empower the steward to give, by any writing under his hand, to be afterwards entered upon the rolls of the manor,) to dispose of his ancient tenement, or any part thereof, by devise, sale, exchange, or mortgage, in such parcel or parcels as he shall think proper, but subject to the payment of such portion or portions of the yearly customary lord's rent payable for the whole of such ancient tenements as shall be set and apportioned upon such parcel or parcels by the lord of the manor of which such ancient tenement is holden, or his steward, or the deputy of such steward; and such parcel or parcels shall, except so far as the tenure or descent thereof shall be affected by this act, be held of the lord of the same manor in all respects, and shall be from time to time conveyed in such manner, as any such original tenement has by custom been held and conveyed."

The crimes of treason and felony are causes of forfeiture to the lord, (even without a custom,) immediately on attainder, as the copyholder is then dead in law. The lord must, however, enter, in order to divest the copyholder's interest, and complete the forfeiture. The crown, and not the lord, takes the copyholds of a person attainted, should there exist an express statute to that effect, but not otherwise, because of the injury which would accrue to the lord; for the Queen could not hold them, if forfeited, as a copyholder, and, consequently, the tenure, with all its fruits, would be lost, or at least suspended. Pardon after attainder does not dispense with the forfeiture.

If an alien purchase a copyhold, even in the name of a trustee, he cannot retain it, but it becomes forfeited to the crown, *quoad* the profits of the estate, the lord getting his services from the alien.⁸⁸

(88) Co. Litt. 2 b.

Outlawry for a capital crime works a forfeiture, but not, it would seem, if it arise in a personal action, for the crown then takes the outlaw's property.

Waste, either voluntary or permissive, is also a cause of forfeiture. So is the wilful denial or refusal of services; also a disclaimer of being the lord's tenant, by the copyholder's declaring that he owes him no services; so, refusing to be sworn on the homage, or being sworn, refusing to present the articles according to his oath; neglecting to attend the court after being personally summoned thereto; refusing to pay certain and reasonable fines, or the customary rent when demanded. So, a copyholder may forfeit by abating ancient inclosures; or by inclosing where no inclosure was before. So by abating, removing, or confounding landmarks.

If the steward shew a court-roll to a copyholder to prove that the land is holden by copy, and the copyholder say he is a freeholder, and shew a deed, pretending thereby to procure his land to be freehold, and tear in pieces the court-roll, it will be a forfeiture.

So if he forge a customary to the injury of the lord.⁸⁹

Of course the forfeiture does not extend beyond the estate or interest of the person offending, and also not beyond the estate or interest to which the cause of forfeiture relates. But though any act of the copyholder, which is confined to one tenement, cannot be the cause of forfeiture as to the others, yet it should seem that any such act, which is confined to *part* of the single tenement, shall be a forfeiture of the whole of that single tenement. It is acknowledged that it is so as to waste, as if a copyholder commit waste in part of a single tenement, as by cutting down a single tree, the whole tenement shall be forfeited. But we are told by Rolle, that if the tenant, holding several acres by the same tenure, make a feoffment of one acre only, that one acre only shall be for-

(89) This is within 5 Eliz., c. 14, § 2.

feited. Yet Sir Edward Coke tells us, that a feoffment of part of the tenancy is the forfeiture of the whole. And although Chief Baron Gilbert thinks the reason is with Rolle, and that it would even hold as to waste in cases where there were no buildings on the premises, yet we should consider that as such feoffment, or act of waste, is incompatible with the relation which the tenant bears to the lord, it must be a forfeiture of the *tenancy*, or a *dissolution of that relation*. By such act the tenant has broken the reciprocal obligation, and shewn himself unworthy of the confidence reposed in him.⁹⁰

Who are incapable of committing acts of forfeiture.

2. The following persons are not capable of committing acts of forfeiture: infants under fourteen; lunatics; idiots; *femes covert*, unless they commit treason or felony, or work an act of forfeiture with their husband's consent; surrenderees before admittance; disseisors; *cestuis que trust*; trustees or mortgagees;⁹¹ unadmitted devisees; mere strangers, and guardians, who can only forfeit their wardship. The forfeiture by one of several joint-tenants will extend to his own part only.

Presentment of a forfeiture.

3. The necessity of a presentment of the act of forfeiture is a question by no means settled.

Mr. Watkins⁹² gives the following opinion:—In many cases the lord may enter immediately into the lands, without the intervention of a presentment of the forfeiture: in others, a regular presentment is previously requisite, or, at least, advisable.

Where the offence which is the cause of forfeiture, is in its very nature apparent and notorious, and such as by common presumption the lord cannot avoid noticing, no presentment can be necessary, as a presentment is only for his instruction.

(90) 1 Wat. Cop. p. 519.

(91) 4 & 5 Wm. IV., c. 23, § 3.

(92) 1 Cop. p. 534, *et seq.*

If a person, therefore, be attainted of treason or felony, the lord may seize without any presentment by the homage ; since the commission of the offence is ascertained and made of publicity by his conviction in a court of law.

So, if the forfeiture be in consequence of any act or refusal in the presence of the lord, as in open court, no presentment can be requisite ; as the end of presentment is already answered. Thus, if a proclamation be made for an heir to claim, and no claim be made ; if a copyholder be personally warned to do suit at a particular court, and he does it not ; or if he appear in court, and openly and absolutely refuse to be sworn on the homage, according to the custom, or the like, a presentment must be evidently nugatory.

But when the cause of forfeiture is such that by common presumption the lord cannot have notice, a presentment should be made to apprise and inform him of it ; however it does not appear that even in this case, it is in any ways of necessity. A presentment is, as we have seen, only the means of information as to the lord : if the circumstance be already known to him any further means of instruction must be needless. If he, therefore, is aware of the event of which a forfeiture would be the consequence, he may avail himself of it without a presentment. Still, however, it is prudent and advisable to present such event in open court, that the matter may be apparent to others ; and for the satisfaction of the remaining tenants, as well as a sanction to the lord.⁹³

Mr. Serj. Scriven⁹⁴ submits that no presentment can be requisite in any case, in order to enable the lord to take advantage of a forfeiture, but that the several acts enumerated are forfeitures of the copyholder's interest *ipso facto*, entitling the lord, if he please, to enter for the offence, *as a determination of his will*.⁹⁵

(93) 1 Cop. p. 534, *et seq.*

(94) 1 Cop. p. 541.

(95) The authorities relied upon for this position are *East v. Harding*,

Who may
act upon, or
dispense
with, a forfei-
ture.

4. The lord, *pro tempore*, may take advantage of forfeiture, which he must do by entering within twenty years; and where a tenant for life commits forfeiture, the lord, and not the remainder-man, can only take advantage of it; unless the remainder fall into possession upon the forfeiture of the particular estate.

Any person who is lord by right, who might have taken advantage of a forfeiture, may dispense with it, though he be but a tenant at will, by any act, after the forfeiture is known to him, whereby he acknowledges such copyholder as his tenant. Thus the re-admittance of the copyholder, or the admittance of his heir, or the presentment of the death of such offending copyholder, (this being an acknowledgment that he is a tenant,) or by amercing him for non-appearance, or by accepting a surrender from him, or of rent or services, or by distraining for either, are all acts operating as a dispensation of a previous forfeiture, and bind those in reversion or remainder. The Court of Chancery will interfere to moderate rigorous custom, by relieving against unreasonable forfeitures, when there are equitable circumstances entitling a tenant to such relief.

A copyholder may try his title by an action of ejectment.

Extinguish-
ment and
suspension.

5. When a copyholder transfers his interest to the lord, or does any other act indicative of an intention to relinquish his tenancy, the copyhold interest is for ever extinguished. When a freehold and a copyhold interest in the same premises unite in the same person and in the same right, the copyhold interest becomes extinguished; but if they are vested in the same person in different rights, the copyhold interest is suspended only. Yet the interests need not be commensurate with each other, nor be confined to the

Cro. Eliz. 499; *Milfax v. Baker*, 1 Lev. 26; and *Benison or Benson v. Strodle*, T. Jones, 190. See 5 Barn. and Adol. 780.

same premises, so the same premises be included in both tenures.⁹⁶ A release of copyholds to the grantee of the freehold, operates as an extinguishment of the copyhold interest, the same as a conveyance to the lord of the manor, where there has been no severance of the freehold. If lands escheat or are forfeited to the lord, it is an extinguishment of the copyhold interest, and of all customs and privileges annexed to it. The copyhold interest becomes suspended by union with the freehold, where a copyholder of his own right becomes seised of the manor or the freehold interest in his copyhold tenement in right only of another, or *vice versa*. So if a copyholder marry the *seignioress*, the copyhold interest will be suspended during the coverture only.

A copyhold interest may also be extinguished by the annexation of the freehold to the copyhold; as if a copyholder accept a lease for years from the lord of his copyhold tenement, or accept a conveyance, or even a lease for years of the manor, or if the manor descend to him, in either case the copyhold interest would be extinguished.

There is the following essential difference between a conveyance of a portion of the copyhold interest by the tenant to the lord, and a conveyance of a portion of the freehold interest by the lord to the tenant, that in the former instance the portion only of the copyhold interest so conveyed to the lord will be extinguished, but the latter will operate as an extinguishment of the whole copyhold interest for ever.

It must be recollected, however, that so long as the demisable quality of the estate subsists, it may be re-granted again by the lord to hold by copy of court-roll.

(96) 1 Wat. Cop. p. 545.

CHAPTER VI.

COMMUTATION AND ENFRANCHISEMENT.

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| <ol style="list-style-type: none"> 1. The Copyhold Commissioners. 2. Provision against disabilities, and the appointment of an attorney. 3. Meetings to agree on the terms of COMMUTATION, and as to agreements and provisional agreements. 4. The appointment of valuers. 5. The depositing of the valuations, and the meeting, to hear any objections thereto. 6. Costs. 7. The schedule. 8. Rent-charge, how enforced. 9. Disputes, how settled. 10. Voluntary, supplemental, or substituted commutations. 11. Forms of procedure, with directions. 12. ENFRANCHISEMENT—described. | <ol style="list-style-type: none"> 13. Its consequences. 14. Power afforded by the act to effect <i>voluntary</i> enfranchisement. 15. The deferring of the payments—substituted titles. 16. General expences, and their recovery. 17. Power to mortgage. 18. How commuted lands are to be held, and their mode of descent. 19. The effect of an enfranchisement. 20. The 6 & 7 Vict., c. 23. 21. The 7 & 8 Vict., c. 55. 22. Official statement of the commissioners as to the terms of enfranchisement. 23. Forms of procedure, with directions. 24. Deeds of enfranchisement. 25. Statutes affecting copyholds. |
|---|---|

DURING these few years past the legislature has made several statutes, having for their object the commutation⁹⁷ of, or adequate compensation for, the manorial rights, such as rents, fines, and heriots, to which copyhold and customary tenure are subject, and also the facilitating the *voluntary* enfranchisement of such lands. The acts are 4 & 5 Vict., c. 35; 6 & 7 Vict., c. 23; 7 & 8 Vict., c. 55; and 10 Vict., c. 101. We will proceed to state their effect and operation, premising that a commutation or enfranchisement may be affected independently of these acts.⁹⁸

The copyhold commissioners.

I. The Tithe Commissioners for England and Wales (the number of whom is never to exceed three) are appointed

(97) The attempt at commutation has hitherto turned out a complete failure.

(98) 4 & 5 Vict., c. 35, § 83.

the commissioners for carrying the provisions of these acts into execution. They are styled "The Copyhold Commissioners"⁹⁹ when acting in these cases, and any two of them form a board to transact business. They have an official seal, with which all documents must be stamped, when they are receivable in evidence, without any further proof. Their office must be in London or Westminster. It is at No. 9, Somerset Place, Somerset House, at present. The commissioners make an annual report to the Home Secretary of State, which is then laid by him before parliament. They are empowered to appoint and remove assistant commissioners, or secretary, and other servants and officers, as shall be deemed necessary. They cannot sit in parliament, and their salaries and allowances are paid out of the consolidated fund. They make a solemn declaration to act honestly in the discharge of their duties, which, however, they may delegate to their assistant commissioners, who pledge their impartiality by a like solemnity. (4 & 5 Vict., c. 35, §§ 1—10.)

2. Whenever the lord or tenant of a manor, or any person interested in any question or right connected with any commutation or enfranchisement, shall be a minor, idiot, lunatic, *feme covert*, or under any other legal disability, or shall be beyond the seas, the guardian, trustees, committee of the estate, husband, or attorney of such person respectively, or in default thereof, or in case the party interested shall be unknown or not ascertained, then such person as may be nominated for that purpose by the said commissioners under their hands and seal, after due inquiry shall have been made by them, as to the fitness of such person, shall for the purposes of this act be substi-

Provision
against dis-
abilities, and
the appoint-
ment of an
attorney.

(99) This board was appointed for five years by 4 & 5 Vict., c. 35, § 6; but this term was extended by 10 Vict., c. 101, to the first day of October, 1850, and to the end of the then next session of parliament.

tuted in the place of such lord, tenant, or other person : Provided always, that if any lord, tenant, or other person interested as aforesaid, shall be a trustee for charitable purposes, and the annual value of the charity estate shall exceed fifty pounds, such trustee shall not sign any agreement or power of attorney, or join in any proceedings under this act, without an order of Her Majesty's High Court of Chancery, to be applied for by petition ; but on such order being obtained, or if the annual value of the charity estate shall not exceed fifty pounds, such trustee may sign any agreement or power of attorney, and otherwise join in any proceedings under this act, as if he had been beneficially interested in such charity estate.

Any lord or tenant of a manor, or any other person interested in any commutation may, by a power of attorney given in writing under his hand, or in the case of a corporation aggregate under the common seal of such corporation, from time to time appoint an agent to act for him in carrying into execution the provisions of these acts ; and all things which are directed or authorized to be done by or in relation to any person may be fully done by or in relation to the agent so duly authorized of such person ; and every such agent shall have full power, in the name and on behalf of his principal, to concur in and execute any agreement and vote in any question arising out of the execution of this act, and make any inspection and sign any notice of objection under the provisions of this act ; and every person shall be bound by the acts of any such agent, according to the authority committed to him, as fully as if the principal of such agent had so acted ; and the power of attorney under which the agent shall have acted, or a copy thereof authenticated by the signature of two credible witnesses, shall, at the first meeting attended by such attorney under such power, or whenever requested by the chairman or by any other interested party present at such meeting, be delivered to the chairman for the time

being, and the same or any like copy shall be appended to every agreement executed by any such attorney, and shall be sent with it to the office of the said commissioners as herein-after provided : Provided always, that if any person having made such an appointment shall deliver notice in writing, or under a common seal, (as the case may require,) of the revocation thereof, to the chairman at any such meeting, no act which shall be done by the person so appointed after the delivery of such notice, without a fresh appointment, shall bind the principal ; and any such power may be in the form following :

‘ Manor of _____ in the county of _____ :
 I *A. B.* of &c., lord [or copyholder, customary tenant, or freeholder, *as the case may be,*] of the said manor, do hereby appoint *C. D.* of, &c., to be my lawful attorney, to act for me in all respects as if I myself were present and acting in the execution of an act passed in the fourth year of the reign of her present Majesty, intituled [*here insert the title of the act.*] Dated this _____ day of _____, one thousand eight hundred and _____.

(Signed) *A. B.* (§§ 11 & 12.)

By a commutation, the most burdensome incidents affecting copyhold and customary property, as rents, fines, heriots, and rights in timber, may be commuted for corn-rents or fixed fines, or for pieces of land, part of the copyholds commuted, and leaving the copyhold tenure in other respects undisturbed. This commutation can in no case be made compulsory on the lord ; but three-fourths of the tenants in number and value may bind the remaining fourth at a meeting called for that purpose.

3. The lord of any manor whose interest shall not be less than one-fourth of the whole annual value of such manor, or any tenant or tenants of any manor to the number of ten, or when there shall not be so many tenants as ten, then one half of the tenants of such manor, may call a

Meetings to agree on the term of commutation, and as to agreements and provisional agreements.

meeting of the lords and tenants of such manor, by notice thereof in writing under his or their hands, to be affixed at least twenty-one days before such meeting on the principal outer door of the church of the parish within the limits of which the said manor or the greater part thereof in value extends, or on the door or on some conspicuous part of some house or building wherein the courts for the said manor are usually held, and to be twice at least within such twenty-one days inserted in some newspaper (or once in each of two newspapers published in successive weeks) generally circulated in the county within which the said manor or the greater part thereof in value extends, for the purpose of making an agreement for the general commutation of the rents, fines, and heriots thereafter to become due in respect of lands holden of such manor, and of the lord's rights in timber; and every lord and tenant attending such meeting shall bear his own expences of attendance; and the lord and tenants who shall be present at any such meeting called as aforesaid, such tenants not being less in number than three-fourths of the tenants of such manor, and the interest of the lord and the interest of the tenants in the manor and lands respectively not being less than three-fourths of the interest in the value thereof respectively, computing the interest of tenants as hereinafter is provided, may proceed to make and execute such an agreement as is hereinafter mentioned for the commutation of the rents, fines, and heriots thereafter to become due in respect of the lands holden of the said manor, and of the lord's rights in timber; and if expressly agreed between such lord and tenants, the commutation may be made to extend to rights in mines and minerals, but otherwise shall not extend to or affect such rights; and thereupon such agreement shall be reduced into writing, and a memorandum or minute thereof shall be signed by the persons so agreeing to such commutation, or by their respective agents.

Such agreement for a commutation of the rights of the lord may be for the payment of an annual sum by way of rent-charge, and of a small fixed fine upon death or alienation, which shall in no case exceed the sum of five shillings, such rent-charge to commence, either in whole or in part, according as the said commissioners shall direct, from the date hereinafter mentioned (except where otherwise directed by the said commissioners), and to be valued and variable (when such rent-charge shall exceed twenty shillings) according to the price of corn, in like manner as is mentioned and provided with regard to the tithe commutation rent-charge in and by the said act for the commutation of tithes in England and Wales [6 & 7 Wm. IV. c. 71] ; and the amount of such rent-charge may be specifically stated in such agreement, or separate rent-charges may be therein agreed upon between the lord and any one or more tenants, parties to the agreement, or the agreement may provide that the entire rent-charge, though stated therein, shall be subject to increase or diminution by the valuers to be appointed as presently mentioned to such an amount *per centum* as shall be therein expressed, or that such separate rent-charges as aforesaid shall be subject to increase or diminution to a given amount *per centum*, in certain events to be specified in the agreement ; and the agreement may also determine the apportionment for each tenant, or it may provide that the entire rent-charge, or the apportionment thereof, shall be fixed by such valuers, subject to the approbation of the said commissioners ; and it may be agreed that so much of the rent-charge, to be apportioned as aforesaid in respect of the lands of any tenant, as shall be in lieu of fines, or other manorial rights to which such tenant would not be liable thereafter during his tenancy, shall not commence until the period of the next act or event on which a fine, or such other manorial right would have become payable or due, and that the amount of such rent-charge shall be then increased accord-

ingly ; but such agreement shall not fix the time for the commencement of the rent-charge to be apportioned in respect of the lands of any tenant who shall not be party to such agreement ; and all other provisions may be made for carrying into execution the intention of the parties and of these acts, so that nothing in such agreement contained (unless every tenant included therein shall be a party thereto) shall exclude or prevent the exercise of the powers given by the legislature for apportioning the rent-charge according to the particular circumstances of each tenement, and for the relief of tenants for life and other persons in the cases presently provided for ; and such agreement may fix a scale of fees to be payable to the steward from and after the confirmation of the apportionment, but so nevertheless as not to affect the interests of any steward in office at the time of the passing of this act who shall hold his office for life or during good behaviour, or of any steward of a manor so in office as aforesaid where the usage shall have been such as in the opinion of the said commissioners to lead to a just expectation that the steward will hold his office during his life or good behaviour ; and such agreement may provide for the costs of the proceedings, subject to the approbation of the said commissioners : Provided always, that in case of doubt or difference as to the sufficiency of interest of the parties to any such agreement, the decision of the said commissioners thereon shall be conclusive ; and every agreement so made and executed, and confirmed in manner presently mentioned, shall be binding on all persons interested in such manor or lands.

Such agreement for a commutation of the rights of the lord may also be for the payment of a fine on death or alienation, or at any fixed period or periods to be agreed upon by the parties, every such fine to be fixed by the agreement, or to be subject to increase or diminution by the valuers, to be appointed to such an amount *per centum*

as shall be expressed in such agreement, but in either case to be valued in bushels of wheat, barley, and oats in the same manner as the tithe commutation rent-charge, and to be subject, in like manner as such rent-charge, to variation according to the prices ascertained by the advertisement provided for, for the commutation of tithes in England and Wales, to be published next before the time of the happening of the act or event on which the fine shall become payable.

The lord and tenants present at such meeting shall elect a chairman (the vote of the lord being reckoned as equal to one-third of the whole number of votes, and the votes of the tenants being reckoned individually), who shall forthwith proceed to ascertain the number and interest of the lord and tenants then present in person or by their agents; and in case it shall thereupon appear that the persons present at such meeting are not sufficient in number and interest, or a sufficient portion are not willing to make and execute such an agreement as shall be binding on all persons interested therein, it shall be lawful, notwithstanding, for any number of the persons present to make and execute a provisional agreement of the like form and tenor; and every such provisional agreement which shall be executed within six calendar months from the day of such meeting by such persons as would have been sufficient in number and interest to make a binding agreement at such meeting, shall be as binding as if the same had been sufficiently executed at such meeting.

The proportional interest of the tenants, so far as relates to their power to make such agreement or provisional agreement, or to appoint valuers, or to give any notice to the said commissioners or assistant commissioners, as provided, shall be computed thus; the interest of every tenant liable to fines arbitrary or uncertain in amount shall be estimated according to the proportional sum at which their lands shall be rated to the relief of the poor

in the parish or place wherein the same are situated, and if any lands shall not be distinctly rated, then in respect of such lands according to the rules by which property of the same kind is in the said parish rated to the relief of the poor; and when such rating cannot be ascertained, then the interest in respect thereof shall be estimated at such proportion, not exceeding two-thirds of the last fine arbitrary paid on admission to the said lands, as the chairman at the said meeting shall consider nearest in amount to the yearly value of the same lands; the interest of tenants liable to fines certain shall be estimated according to such rule as shall be specially made for the occasion by the said commissioners on the application of the lord or tenants by whom the meeting shall have been called, or, for want of such rule, as if the annual value of their respective lands were one-half of the amount of such fine certain; the interest of tenants liable to heriots in kind shall in respect of such liability be estimated according to such rate as shall be specially made for the occasion by the said commissioners on such application as aforesaid, or, for want of such rule, at one-fifth of the annual value of their respective lands, as nearly as the same can be estimated by the chairman at any such meeting; and the interest of no person shall be computed in respect of a copyhold estate who has not been admitted tenant thereof according to the custom of the manor, or who has made an absolute surrender of all his estate and interest therein; and it shall be lawful for the said commissioners to make special rules respecting the computation of the interests of tenants liable to fines certain, heriots, rights in timber, and other manorial rights (if any) which may be the subject of any proposed commutation, on the application or with the consent of a majority of the parties interested, and previous to the execution of any agreement, and such rules shall have the same force as if made by this act.

In case an adjournment of the meeting shall for any cause be desired by a majority in number of the persons attending such meeting in person or by attorney, the chairman shall adjourn the meeting to any time and place then by him to be declared, and so from time to time in case the same shall be in like manner desired by a majority in number of the persons attending such meeting; and notice of every such adjourned meeting shall be given under the hand of the chairman, and shall be affixed in a conspicuous place on the outside of the building in which such meeting, or the last adjournment thereof, shall have been holden, and shall be once advertised in a newspaper as aforesaid; and the like order of proceeding shall be observed at every such adjourned meeting; and every thing done at any such adjourned meeting shall be as valid as if done at the original meeting.

Every such agreement shall bear date on the day on which the first signature is attached thereto, or to the memorandum or minute thereof, and shall be in such form as the commissioners shall from time to time direct, or to the like effect.

The commissioners shall frame and cause to be printed, so soon as conveniently may be after their appointment or beginning to act, forms of notices and agreements, and such other instruments as in their judgment will further the purposes of this act, and supply all or any of such forms to any person or persons requiring the same, or to whom the said commissioners shall think fit to send the same, for the use of any lord or copyholder or other tenant desirous of putting this act into execution.

Actions, suits, and differences as to rights or boundaries may be referred to arbitration by the parties by writing, containing an agreement that such submission shall be made a rule of a court of law.

In every case in which any manor or lands shall be held under any archbishop, bishop, dean, dean and chapter, archdeacon, or any ecclesiastical or other corporation, or

any body politic, and in every case in which any such person, ecclesiastical or other corporation, or body politic, or patron of a living, shall be interested in any manor or lands to the extent of one-third of the value thereof, computed as to such lands as aforesaid, or if it shall appear to the said commissioners that the interests of such person, ecclesiastical or other corporation, or body politic, would be affected by the commutation or enfranchisement under this act, no agreement to be made and executed under this act shall be deemed to be executed by the said lord and tenants unless the consent of such person, ecclesiastical or other corporation, or body politic, shall be given under the hand or seal of the person, ecclesiastical or other corporation, or body politic, or patron of such living giving the same; and such consent shall be annexed to the agreement for commutation or enfranchisement, and taken as part thereof.

Every such agreement, as soon as may be after it shall have been executed by the lord and tenants to the number and value as aforesaid, shall be sent by the chairman of the meeting, or by the person in whose custody it shall then be, to the office of the said commissioners; and the said commissioners, by themselves or by some assistant commissioner, shall cause inquiry to be made, and shall require such proof as will be satisfactory to them, whether or not it ought to be confirmed; and if they shall be satisfied that it ought to be confirmed, the said commissioners shall confirm the agreement under their hands and seal, and shall add to such agreement the date of the confirmation, and shall publish the fact of such confirmation, and the date thereof, within the manor, in such way as they shall deem fit; and every such confirmed agreement shall be binding on all persons interested in the said manor and on all persons interested in the said lands, and shall not be liable to be invalidated by reason of any doubt or question as to the sufficiency in the number and interest of the parties entering into such agreement: Provided always, that it shall

be lawful for the said commissioners, by themselves, or by some assistant commissioner, at their discretion, if the circumstances of the case shall in their opinion require it, to direct that the rent-charge to be paid by any particular tenant or tenants shall not commence until the period of the next act or event on which the fine or other manorial right for which such rent-charge shall be commuted would have become due and payable, and that the amount of such rent-charge shall be then increased in such proportions as the said commissioners or assistant commissioner shall think proper. (§§ 13—23.)

4. Valuers are appointed at any meeting; their appointment must be approved by the commissioners, and if an equal number be appointed, the commissioners may appoint an umpire between them. The appointment of valuers. The valuers cannot act until they have made a solemn declaration. They may enter upon the lands in the discharge of their duties on producing a written authority from the commissioners. The stewards must furnish all the information required by the valuers, and make such schedules and statements as the commissioners direct. The valuers are to take the particular circumstances of each case into consideration. If valuers be not appointed within six calendar months after the confirmation of the agreement, or their valuation be not made within this period, the commissioners may appoint valuers. (§§ 24—28, and 38.)

5. As soon as the valuations, apportionments, or schedules are made by the valuers and have been sent to the commissioners, they shall cause a copy of the same to be deposited in the hands of the steward for the time being of the manor, or if there shall be no steward, with the lord of the said manor, or with such person as they shall see fit, for the inspection of all persons interested therein within the manor, or within a parish wherein part of the manor is situated, and shall forthwith cause notice to be The depositing of the valuations, and the meeting to hear any objection thereto.

given through such steward or lord, or in such manner as to the said commissioners shall seem fit, of such copy being so deposited for inspection, and which inspection shall at all reasonable times, up to the meeting after mentioned, be allowed by such steward or lord without fee (and for every neglect to allow which such steward or lord shall forfeit such sum not exceeding twenty shillings as the said commissioners shall order and direct, and which shall be deducted from the sums payable to such steward or lord under this act); and in such notice such place and time, or places and times, shall be fixed as the said commissioners shall think fit (the first not earlier than twenty-one days from the first giving such notice) for holding a meeting for hearing and determining objections to the said valuation, or the amount of costs claimed by the said valuers, or to the said steward's schedule, by any parties interested; and the said commissioners or some assistant commissioner (to whom respectively such steward or lord shall on the day before or previous to the commencement of such first meeting, as required, deliver such copy of the said valuations, apportionments, or schedules, with all notices received, as herein-after provided,) shall at such meeting or meetings hear and determine any objection which may then and there be made against the said valuations, apportionments, or schedules respectively, or any part thereof, or adjourn the further hearing thereof, if they or he shall think proper, to a future time, and may, if they or he shall see occasion, direct any further valuations, apportionments, or schedules, inquiries or statements, to be made, and from time to time fix further meetings for the hearing and determining objections, of which further meetings, when not holden by adjournment, notice shall be given in manner herein before directed with regard to the original meeting; provided that, unless upon cause shewn to the satisfaction of the said commissioners, no person shall be entitled to make any objection to any such valuations, apportion-

ments, or schedules, who, being the lord of the said manor, shall not have left notice in writing of such intended objection at the office of the said commissioners ten days before the time fixed for any such meeting, exclusive of the day of leaving such notice, but inclusive of the day of meeting, or who, being any person other than the lord of the said manor, shall not have left notice in writing of such intended objection with or for the steward or lord of the said manor with whom such copies shall be deposited, at the place of deposit thereof, ten days before the time fixed for any such meeting, exclusive of the day of leaving such notice, but inclusive of the day of meeting, forms of which notices shall be forwarded by the said commissioners to the said steward or lord or other person, and shall be by him delivered to any interested party requiring the same ; and which last-mentioned notices the said steward or lord or other person shall, immediately on receipt thereof, annex to such copies or one of them, and shall note such objection on the copy to which the same relates, and allow the inspection of the said notices, in like manner and under the like penalty as aforesaid ; and any default in any of the several matters and things herein-before required shall also subject such steward or lord or other person to the like penalty ; and when the said commissioners or assistant-commissioner shall have heard and determined all such objections they and he are and is hereby required to cause such valuations, apportionments, or schedules to be amended as occasion shall require, and also from time to time, whether at such meeting or not, to amend the steward's schedule, so as to show all deaths and alterations in ages of the tenants or otherwise taking place after making out the same, and before the apportionment herein-after provided for, on being satisfied by the affidavit or declaration, as the case may be, of the steward, sworn or taken before a Master Extraordinary in Chancery, or by such other

proof as they or he may deem sufficient, that such amendments and alterations are required. (§ 29.)

Costs.

6. The expences of the proceedings for effecting any commutation shall (except in cases where from special causes the commissioners shall direct otherwise, and then as they shall direct, and except in cases where the parties to the agreement shall therein otherwise provide, and then as they shall have provided,) be payable in manner following; (that is to say,) where the valuers shall be appointed by the tenants, the costs of the valuations, apportionments, and schedules shall be paid by the tenants included in the commutation, in rateable proportion to the sum charged on their land respectively under and by virtue of this act; but where the valuers shall be appointed by the lord and tenants as aforesaid, then if not more than two shall be appointed, the lord shall pay half the costs, and the tenants as aforesaid shall pay half; and where more than two valuers shall be appointed, the lord shall pay one third, and the tenants as aforesaid shall pay two thirds; and in all cases of dispute or difference as to the amount of the costs, or the persons on whom any costs should fall, the commissioners shall have power to decide the same. (§ 30.)

The schedule.

7. The commissioners then make out a schedule of apportionment, setting forth the description and quantity of the several lands, with the several proprietors and occupiers of them, the amount of rent-charge, and when due, and upon what event it is to be increased or diminished, the fines (if any), and the person to whom the same is payable. This schedule is then deposited with the lord or steward for inspection during a certain time, giving notice thereof; after this it is returned to the commissioners, with notices of any errors therein, which being rectified, the apportionment is then confirmed, and engrossed copies are deposited with the steward of the manor

and the clerk of the peace, for the inspection of all interested parties at two shillings and sixpence, who may have copies or extracts at two-pence per folio. This deposit is notified by advertisement. The commissioners may correct or supply any manifest error or omission in any of the documents, with the written consent of all parties affected by it. (§§ 31—35, and 37.)

8. From the first of January next following the confirmation of the apportionment, the lands are to be discharged from the rents, fines, and heriots, which may be the subject of commutation, and a rent-charge and fixed fine are to be paid in lieu thereof, and enforceable by distress and entry. When the rent-charge is in arrears for twenty-one days after any half-yearly day of payment, the person entitled thereto may distrain, after ten days' notice in writing, left at the residence of the tenant in possession, for two years' arrears. But if the rent-charge be in arrears for forty days after any half-yearly days of payment, and there should be no sufficient distress on the premises, a judge of the superior courts will, upon an affidavit of the facts, order a writ to be issued directing a sheriff to summon a jury to assess the arrears, ten days' notice thereof being given to the owner of the land; upon the return of the sheriff's inquisition a writ of *habere facias possessionem* issues for the purpose of putting the owner of the rent-charge into possession to realize the arrears, costs, and expenses, but not more than two years' arrears over and above the time of possession shall be thus recoverable. The court out of which the writ of possession was issued, or a judge at chambers, may order an account of the rents and profits, and of the receipts and payments to be furnished by the owner of the rent-charge in possession, and the surplus (if any) to be paid over to the person entitled, upon which a writ of *supersedeas* issues. The provisions of the Apportionment Act, 4 & 5 Wm. IV.,

Rent charge,
how enforced.

c. 22, extend to these rent-charges. If a tenant pay the rent-charge, he is to be allowed the same in account with his landlord. In every case in which any tenant or occupier shall show to the commissioners that he holds copyhold lands for a term of years of a tenant of any manor at a lower rent than the sum about to be imposed on the same for commutation or enfranchisement, or for the expenses incurred under the provisions of this act, it shall be lawful for the said commissioners to declare all agreements entered into under the authority of this act null and void so far as regards such lands, and such lands shall be exempted from the provisions of this act, unless the tenant on the court-roll shall give such security, for the payment of all sums so to be charged on such lands, as shall be satisfactory to the said tenant or occupier, and to the commissioners. Nothing in this act contained shall affect any right to any rents, fines, or heriots, or any other manorial right proposed as the subject of commutation, which shall have become due or have accrued on or before the first day of January next following the confirmation of the apportionment. (§§ 36, 45, 46, 51.)

Disputes,
how settled.

9. The commissioners may hear and determine disputes, except as to mines and minerals, upon giving twenty days' notice thereof; and any interested person dissatisfied with such decision may, if the yearly value of the payment to be made or withholden according to such decision shall exceed 20%, bring an action within eight calendar months next after notice thereof in writing, and deliver a feigned issue therein; or, if a point of law be involved, a special case may be stated for the opinion of a court of law. The proceedings are not to abate by reason of the death of any of the parties; and, if a person die before action brought, the same may be commenced and carried on in his name. The commissioners may summon witnesses before them, and examine them, and call for all

papers, and may order expenses of witnesses to be paid to them. (§§ 39—44.)

10. The lord of any manor, and any tenants of such manor (whatever may be their respective interests,) may enter into an agreement, with the consent of the commissioners, for the commutation of the rents, fines, and heriots; and such agreement may include an apportionment of the rent-charge or other consideration for the commutation, and of the costs and expences attending the same, and may fix a scale of fees to be payable to the steward from and after its confirmation; and every such commutation may be made in consideration of a rent-charge to commence and (where it shall exceed the sum of twenty shillings) to be variable as aforesaid, and of a fine certain (not exceeding in any case the sum of five shillings) upon death or alienation, or may be made in consideration of the payment of a fine on death or alienation; and every such rent-charge, or, where the commutation shall be a fine on death or alienation, every such fine, may be made subject to a certain increase or diminution, to be stated in the agreement, or to be afterwards fixed by valuers (as the case may be), in any event which may be provided for by the agreement; and whenever so many as twelve persons, being tenants, or all the tenants of any manor, shall at the same time agree with the lord for any such commutation, and the agreement shall not include apportionment, it shall be lawful to effect such commutation by a schedule to be prepared by the steward, and delivered by him to the commissioners, and to be confirmed and sealed by such commissioners under this act; and all the provisions herein-before contained for carrying into effect a commutation apportionment made by valuers, and for the deposit of copies thereof, shall be applicable to the case of a commutation agreed upon between the lord and such number of his tenants as aforesaid, save that the said com-

Voluntary,
supplemental,
or substituted
commutations.

missioners shall not make any alterations or amendments in such schedule, or the terms of such commutation, without the consent of the parties interested therein: Provided always, that whenever the estate of any party to such commutation shall be less than an estate of fee simple in possession, or corresponding copyhold or customary estate, notice in writing shall be given by or on behalf of such party to the person entitled to the next estate of inheritance in remainder or reversion in the manor or land to be affected by such commutation, so that the assent or dissent or acquiescence of such person entitled in remainder or reversion may be stated in writing to the said commissioners when such a schedule of apportionment as aforesaid shall be sent to them, but the said commissioners shall notwithstanding cause such further notices to be given and such other inquiries to be made as they shall deem fit before confirming such apportionment; and in all cases, if the parties shall think fit, a commutation may be effected, with the consent of the said commissioners, by such conveyance, deed, or assurance as would or might be adopted for carrying into effect such commutation if the lord were seised of the manor for an absolute estate of inheritance in fee simple in possession, or by any agreement to be enrolled or entered on the court rolls of the manor, a copy thereof delivered to the tenant, as in cases of admission to lands copyhold of the manor. § 52.

Powers are then given to effect supplemental or substituted commutations, to recover fines, and to apportion rent and fines. (§§ 52—55.)

Forms of
procedure,
with direc-
tions.

11. We here give the directions as to the forms of procedure under these statutes, as issued by the copyhold commissioners, which we do with their sanction.

The following forms¹⁰⁰ will be found to apply to cases

(100) The forms here given, commencing at p. 279, *post*, are intended

of manorial commutations—to cases of partial commutations, that is, by agreements not being manorial agreements, and not including all the tenants of a manor,—and to cases where parties commuting or enfranchising are under disability.

Nos. 1, 2, and 3, include the notices and declarations which may serve to bring the parties together at a manorial meeting held for the purpose of effecting a commutation.

No. 4 contains forms of minutes of the various proceedings which may be supposed to take place at such meetings. The most important portion of these forms is that which relates to the minute, which is to serve as a basis of an agreement for commutation, No. 4, E.

When meetings to commute are assembled, the parties may, in some few cases, find themselves prepared at once to execute fully, or provisionally, a formal agreement, and in such cases they may proceed at once to use the form marked No. 5, and to make the minute given in Nos. 7 or 8; but it will not often happen that the parties are prepared at once to execute such an instrument; the most that will ordinarily be done at the first, and perhaps some subsequent meetings, will be to assent to principles of commutation, the details of which are subsequently to be embodied in an agreement; and when such preliminary assent has been obtained, a minute should be entered on the proceedings, which may serve as a record of it, and furnish the basis of a formal agreement to be afterwards prepared.

The forms of such minutes as “the basis of an agreement,” with variations to meet different cases, are given in form, No. 4, E.

No. 5 is the form of a manorial agreement to commute. Such an agreement may be either perfect or provisional—

for the guidance of parties availing themselves of the act, and must be varied to suit the particular circumstances of each case.

that is, the signatures of the parties present may be sufficient to give validity to an agreement, or insufficient. In the second case a provisional agreement only can be executed.

One name at least must be affixed to such a provisional agreement at the meeting itself: the other parties may sign within six calendar months afterwards.¹⁰¹

When an agreement, either perfect or provisional, is signed at a meeting, a short minute of that fact should be recorded by the chairman, as in forms Nos. 7 and 8.

The form of a manorial agreement, No. 5, is given to meet cases in which the tenants, or three-fourths of the tenants, in number and value, can determine on the joint consideration to be given to the lord, but cannot at once determine unanimously on the precise portion which is to be contributed by each.

In all such cases, a manorial agreement (form, No. 5), followed by an apportionment under the act, presents the only means of completing the transaction; but if all the tenants can agree amongst themselves, or can trust a valuer to fix for them, the sums to be paid by each of them, and can thus embody the distribution of the whole sum to be given to the lord in a schedule of apportionment, to be annexed to and form part of their agreement, they will save much of the trouble and expense necessary to complete a manorial apportionment under the act.

To effect this they will use, not the form of a manorial agreement (No. 5), but that sort of agreement (see forms Nos. 9 and 10), which any two or more tenants are authorized to execute under sec. 52 of the 4 and 5 Vict., c. 35. These agreements require no previous meeting to give them validity, and, if form No. 10 be used, no subsequent apportionment.

The act (§ 52), allows any one or more tenants thus to

(101) See 4 & 5 Vict., c. 35, § 16.

commute by agreement partially—that is, leaving out the other tenants, without previous meetings, and paying no stamp duty (§ 93), and all such agreements may or may not contain schedules of apportionment. If they do not contain schedules of apportionment, then the steward is to frame one which is to go through all the processes of investigation provided for in the case of apportionments consequent on manorial agreements. Under the same section any one tenant may agree with the lord for commutation; but in such case there will of course be no necessity for an apportionment.

*No. 1.—Notice and Advertisement of Meeting, by Lord
[or Lords].*

(Under 4 and 5 Vict. c. 35, § 13.)

Manor of

in the County of

}

I [We], the undersigned, being [the duly authorized agent of] a lord [or Notice of meeting by lord.
of the lords, as the case may be] of the said manor, whose interest is [or
whose interests are] not less than one-fourth of the whole annual value of such manor, do, by this notice under my hand [or our hands], call a meeting of the lords and tenants of the said manor, for the purpose of making an agreement for the general commutation of the rents, fines, and heriots, thereafter to become due in respect of lands holden of the said manor and of the lord's rights in timber [or of one or more of such rights, as may be agreed upon at such meeting], pursuant to the provisions of an Act passed in the fifth year of the reign of her present Majesty Queen Victoria, intituled "An Act for the commutation of certain manorial rights in respect of land of copyhold and customary tenure, and in respect of other lands subject to such rights, and for facilitating the enfranchisement of such lands, and for the improvement of such tenure." And I [we] do hereby give notice that such meeting will be held at, &c., on — day the — day of — next, at the hour of [eleven in the forenoon].

Given under my hand [our hands] the — day of — 18 —.

[To be signed by the parties, and, where signing as agent, to add, "Agent for C. D., Lord of the said Manor."]

Note.—That a manor may be such portion or portions of a manor as the Commissioners shall, by any order in writing, with the consent of the Lord, direct to be considered as a manor. See § 102.

*No. 2.—Notice and Advertisement of Meeting by Tenants.**(Under 4 and 5 Vict. c. 35, § 13.)*

Manor of }
in the County of

Notice of
meeting by
tenants.

We, the undersigned, being tenants [*or the duly authorized agent or agents of tenants, as the case may be*] of the said manor, do, by this notice, under our hands, call a meeting of the lords and tenants of the said manor, for the purpose of making an agreement for the general commutation of the rents, fines, and heriots thereafter to become due in respect of lands holden of the said manor, and of the lord's right in timber [*or of one or more of such rights, as may be agreed upon at such meeting*], pursuant to the provisions of an Act passed in the fifth year of the reign of her present Majesty Queen Victoria, intituled, "An Act for the commutation of certain manorial rights in respect of lands of copyhold and customary tenure, and in respect of other lands subject to such rights, and for facilitating the enfranchisement of such lands, and for the improvement of such tenure." And we do hereby give notice that such meeting will be held at, &c., on — day the — day of — next, at the hour of [*eleven in the forenoon*].

Given under our hands this — day of — 18 —.

[To be signed by ten tenants of the manor, or their authorized agents; or where there shall not be so many tenants as ten, then by one-half of the tenants of the said manor, or their authorized agents.—See § 13.]

Note.—A copy of the Notices, whether by Lord or Tenant, should be forwarded to the Copyhold Commissioners.

No. 3.—Declaration that Notice has been duly affixed on Church Door, &c.

Notice af-
fixed on
church door.

I [A. B.], of, &c., do solemnly and sincerely declare that I did, on the — day of — affix on the principal outer door of the church of the parish of —, in the county of —, being as I do verily believe the parish within the limits of which the manor of — in the said county or the greater part thereof in value extends [*or did on, &c., affix on the door or on — being a conspicuous part of the house or building called, &c., wherein the courts of the said manor are usually held*], a notice whereof a true copy is hereunto annexed; and which notice, to the best of my knowledge and belief, was duly signed by the persons whose names are thereunder written, and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled

"An Act to repeal an Act of the present Session of Parliament, intituled ^{5 & 6 Wm. 4,} An Act for the more effectual abolition of oaths and affirmations taken and ^{c. 62.} made in the various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extrajudicial oaths and affidavits; and to make other provisions for the abolition of unnecessary oaths."

* * * *The production of the Newspapers will show that the Meeting has been duly advertised.*

No. 4.—*Minutes of Proceedings at the Meeting.*

Manor of }
in the County of }

Proceedings of a meeting of the lord [or lords] and tenants of the said manor, held at, &c., on, &c., for the purpose of, &c. [*as in notice.*] At this meeting were present in person, &c. [*state the names of the lords and tenants present, distinguishing them*], and by their agents, &c. [*stating the parties and their respective agents, if any.*]

A.
Commencement and appointment of chairman. As to legal mode of appointing a chairman, see 4 & 5 Vict. c. 35, § 16.

The lord [or lords] and tenants present at this meeting elected A. B. to be chairman, and agreeably with the provisions of the said Act the chairman did proceed to ascertain the number and interest of the lord [or lords] and tenants present in person or by their agents, and computing as directed by the said Act, the lord [or lords] so present appeared to be interested to the whole extent of the value [or to the extent of three-fourths of the value] of the said manor, and in interest three-fourths in value, as required by the said Act.

The consideration of the agreement proposed by the aforesaid notice to be made was entered upon; but it being desired by a majority in number of the persons attending this meeting in person, or by attorney, as aforesaid, the chairman did adjourn the meeting to — day, the — day of — to be then holden at, &c., at the hour of, &c., and did declare the time and place to which such adjournment was made. And notice of such adjourned meeting was made and given under the hand of the said chairman, and was affixed in a conspicuous place on the outside of the building in which the said meeting was held, and a duplicate of such notice was in like manner made, for the purpose of being advertised agreeably with the provisions of the said Act.

B.
Adjournment. See § 18.

NOTE.—*When a meeting is adjourned, it must be recollected that it is not sufficient for the chairman to sign a Minute of such adjournment, and then leave the chair. He must also sign the notices of such adjournment, which are to be dealt with as directed by § 18, or all the proceedings will fall to the ground.*

Manor of }
in the County of }

C.
Notice of ad-
journment.

I [A. B.], having been duly elected chairman of the meeting [or adjourned meeting] [held on the — day of — 18 , at, &c., for the purpose of making an agreement, &c. [*see notice of original meeting*], do hereby give notice, that in compliance with the desire of the majority in number of the persons attending such meeting in person or by attorney, I do adjourn the said meeting to — day, the — day of — 18 —.

Dated this — day of — 18 —.

(Signed)

A. B., Chairman.

Manor of }
in the County of }

D.
Proceedings
at adjourned
meetings.

Proceedings of an adjourned meeting of the lord [or lords] and tenants of the said manor, held at, &c., for the purpose of, &c. [*as in notice.*]

State the persons present, the election of chairman, and the ascertaining that a sufficient proportion were present, as at an original meeting.

E.
Minute as
the basis of
an agree-
ment for
commuta-
tion.

At this meeting, the lord [or lords] and tenants present thereat, and such tenants being not less in number than three-fourths of the tenants of the said manor, and the interest of the lord [or lords] and of the tenants so present in the manor and lands respectively, not being less than three-fourths of the interest in the value thereof respectively, computing the interest of the tenants as in the said Act is provided, did proceed to make an agreement, as hereinafter expressed, for the commutation of the rents, fines, and heriots, from the 1st day of January next following the final confirmation of apportionment, as by the said Act provided, to become due in respect of the lands holden of the said manor, and of the lord's right in timber [also it was expressly agreed, that such commutation should extend to rights in mines and minerals].

At a Rent-charge and Nominal Fines.

And it was further agreed, that such commutation should be effected in consideration of an annual sum by way of a rent-charge, and of a fixed fine of 5s. to be paid on death or alienation in respect of every tenement holden of the said manor.

Entire Rent-charge to be Apportioned.

And it was further agreed, that such rent-charge should be the sum of — pounds, but to be from time to time variable, according to the price

of corn, as in the said Act mentioned; such entire rent-charge to be apportioned between the tenants of the said manor by valuers, as in the said Act provided, and the lord's rights to remain as at present, until such rent-charge should commence.

Note.—This will be a variable corn-rent, see s. 36. If the rent-charge shall not exceed 20s., it will not vary according to the price of corn, see § 36.

Rent-charge to be subject to Increase and Diminution by Valuers.

And it was further agreed, that such sum by way of rent-charge should be subject to increase or diminution by the valuers to be appointed in the making such apportionments to any proportion not exceeding — per cent., if such valuers should find that the annual value of the lands copyhold of the said manor should exceed or be under the sum of — pounds; but the lord is to bear no part of the expense of the valuation, or of other charge by the valuers under this power given to them.

Amount of Rent-charge to be fixed by Valuers.

And it was further agreed, that the amount of such annual sum or rent-charge to be paid to the lord [or lords] should be fixed by the valuers hereinafter appointed, or their umpire to be appointed, agreeably with the provisions of the said Act, and to be variable according to the price of corn, as in the said Act mentioned, and to be apportioned between the tenants of the said manor by the said valuers or umpire.

Net Rent-charge in respect of Fines, &c., may be postponed till next Act, &c.

Also, that so much of the rent-charge to be apportioned for the lands of any tenant as should be in lieu of fines, or other manorial rights, to which such tenant would not be liable hereafter during his tenancy, should not commence until the period of the next act or event on which a fine or such other manorial rights would have become payable or due, and that the amount of such rent-charge should then be increased accordingly; the amount of increased rent-charge to be fixed by the Copyhold Commissioners.

Commutation to be made for Land.

And it was further agreed, that such commutation should be effected in consideration of a conveyance of lands, parcel of the said manor, &c.

[These forms will vary according to the particular circumstances of each case.]

F.
Appoint-
ment of valu-
ers under
§ 24.

Also at this meeting — of, &c., and — of, &c., were appointed valuers for the purposes of the said commutation, as directed by the said Act, the votes on such appointment appearing in the paper marked — hereunto annexed.

[To be signed by all the parties present in person, or by attorney.]

[No appointment of valuers will be valid unless the agreement has been, or shall be, executed by persons having sufficient interest.]

[NOTE.—It should be remembered that the whole of the Minute is only the basis of an agreement, and when such a Minute has been made, great care must be taken legally to adjourn the meeting to some future day, when a formal agreement may be executed either fully or provisionally. The first signature to every formal agreement must be affixed at a meeting, and if after framing a Minute the parties separate without adjourning, a fresh meeting must be called by notice and advertisement, and all the proceedings gone through de novo.]

No. 5.—*Agreement for Commutation for Rent-charge, &c.*

Commuta-
tion for rent
charge.

[It should be remembered that the first signature to all formal agreements must be affixed at a legal meeting, and care must be taken to keep meetings alive by adjournment till such an agreement as that of which the form follows is ripe for signature. Parties will find that they will save time and expense by sending up the draft of the agreement to be examined and corrected at the Copyhold Commission before it is finally prepared for execution. It should also be remembered, that the agreement, when executed, should be forwarded to the Copyhold Commissioners.]

Manor of
in the County of

}

Articles of Agreement, in pursuance of an Act passed in the fifth year of the reign of her present Majesty Queen Victoria, intituled “An Act for the Commutation of certain Manorial Rights in respect of Land of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights, and for facilitating the Enfranchisement of such Lands, and for the Improvement of such Tenure,” made [and executed] at a meeting holden [by adjournment] at, &c., on, &c., for the purpose of, &c. [see Notice], between — of, &c., lord [or lords] of the said manor of the one part, and the several other persons by whom, or by whose attorney or agent, duly authorised in that behalf, these presents are executed, being tenants of the said manor, not less than three-fourths in number and in interest, not being less than three-fourths in value, computed agreeably with the provisions of the said Act, of the other part.

Witness that at the said meeting it hath been, and is agreed upon, by and between all the parties to these presents, to effect a commutation of the

rents, fines, and heriots, to become due in respect of the lands holden of the said manor, from the 1st day of January next following the final confirmation of apportionment, as by the said Act provided, and also for a commutation of the lord's rights in timber [and also, by express agreement between the said parties hereto, for commutation of the lord's rights in mines and minerals.]

That such commutation shall be effected in consideration of an annual sum, by way of rent-charge, and of a fixed fine of 5s. to be paid on death or alienation in respect of every tenement holden of the said manor.

That such rent-charge shall be the sum of — pounds, but to be from time to time, &c. [see *Minutes*, No. 4, E.]

[For proviso that the same shall be subject to increase or diminution, see also *Minutes*, No. 4, E, and the like where the amount is to be fixed by the valuers, &c.]

Or, That such commutation shall be effected in consideration of certain lands, parcels of the said manor, that is to say, all that, &c. [describe the lands.]

In witness whereof the respective parties hereto have hereunto set their hands and seals, the day and year first above written.

Parties.	Witnesses.
Names, Residence, and Description. Name, &c., of Attorney.	Signed, Sealed, and delivered, by the parties, whose names are opposite to the names of the respective witnesses, in the presence of

No. 6.—Steward's Statement for Meetings, &c.

Manor of }
in the County of }

A statement of the several tenants of the said manor, and of the lauds to which they respectively stand admitted for life, or otherwise, or which they hold subject to fines, heriots, or other manorial rights, and of the amount to which the same lands are rated to the relief of the poor, so far as I can distinguish or estimate the same, and of the amounts received by the lord [or lords] on account of the three last heriots in respect of any such lands [and of such other information as the Copyhold Commissioners have directed me to furnish, and which I can procure and produce without prejudice to the rights and interests of the lord [or lords] of the said manor].

Steward's
statement
for meetings.

The following Information is to be given in Columns:—

- Names of the tenants.—2. Copyholders, or what class of tenants.—3. Abstract of the description of the lands in the court-rolls, and in what parishes situated.—4. Explanatory remarks on such descriptions.—5. Total

assessment to the poor-rate of the lands and others assessed therewith.—
6. Estimated proportion for copyholds, or amount when separately assessed.
—7. Subject to fines, heriots, and what other rights.—8. Amount of receipts on account of three last heriots.—9. A blank column for the chairman to bring out the voting value.

I declare the above statement to be correct, so far as I can procure the information required, agreeably with the provisions of the statute directing me to prepare the above statement.

Dated, &c.

(Signed) A. B., steward of the said manor.

[Tenants should be aware that they will have to pay for this statement if they apply for it (4 and 5 Vict. c. 35, § 27), and should ascertain whether other tenants have applied. By the same section three tenants must join in the application to the steward, or it may be made by the chairman of any meeting, or by the valuers.]

No. 7.—Minute of a Meeting at which an Agreement to commute has been signed.

Manor of

in the County of

}

Minute of
agreement
to commute.

At this meeting the lord [or lords] and tenants present thereat, such tenants being not less in number than three-fourths of the tenants of the said manor, and the interest of the lord [or lords] and of the tenants so present in the manor and lands respectively not being less than three-fourths of the interest in the value thereof respectively, computing the interest of the tenants as in the said Act is provided, did proceed to make an agreement for the commutation of the rents, fines, and heriots to become due in respect of the lands holden of the said manor, and of the lord's rights in timber, and the said lord [or lords] and the said tenants have duly signed and executed the said agreement.

Dated this — day of

(Signed)

A. B., Chairman.

No. 8.—Minute of Meeting at which a "Provisional" Agreement to commute has been signed.

Manor of

in the County of

}

Minute of
provisional
agreement to
commute.

At this meeting the lord [or lords] and tenants present thereat did proceed to make a provisional agreement for the commutation of the rents, fines,

and heriots, to become due in respect of the lands holden of the said manor, and of the lord's rights in timber, and have duly signed and executed the said agreement.

Dated this — day of

A. B., Chairman.

No. 9.—Agreement with two or more Tenants for the Commutation of Manorial Rights when the Rent-charge is not apportioned by the Parties in the Agreement, but is left to be apportioned by the Steward. (See § 52.)

Manor of
in the County of }

Memorandum of Agreement made the — day of — 18 —
Between A. B., of &c., lord of the said manor, of the first part; C. D., of &c., a tenant of the said manor, of the second part; E. F., of, &c., another tenant of the said manor, of the third part, &c. (*according to the number of the said tenants*), **Witness**, that in pursuance of the powers and authorities for that purpose given in and by an Act passed in the fifth year of the reign of her present Majesty Queen Victoria, intituled “An Act for the Commutation of Certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights, and for facilitating the Enfranchisement of such Lands, and for the improvement of such Tenure,” the said parties above named, lord and tenants of the said manor, to the number of — [*or being all the tenants of the said manor*] [with the consent of the said Commissioners under the said Act, testified by their signature and seal respectively hereupon written and impressed], do hereby contract and agree for the commutation of the rents, fines, and heriots payable to the said lord in respect of the lands described in the schedule hereunder written (*here specify any other rights which may be the subject of the agreement*), in consideration of a rent-charge to be paid in respect of all the said lands described in the schedule hereunder written, and of a fine certain of the sum of five shillings, to be paid in respect of each and every of the said lands respectively, on the death or alienation of the said several tenants, parties hereto. ~~And it is hereby agreed~~ that such rent-charge shall be the sum of — pounds,* but shall be variable from time to time according to the price of corn, as in the said Act mentioned and provided. And it is hereby agreed that such rent-charge shall commence from the — day of — and be respectively payable to the said A. B. [and other the lord and lords, lady and ladies, of the said manor for the time

Agreement with two or more tenants when the rent charge is not apportioned in the agreement.

* This will be a variable corn-rent. See § 36

being] half-yearly, on the first day of July and the first day of January for ever hereafter, and that the first payment shall be made on the — day of —

As witness the hands of the said parties the day and year first above written.

THE SCHEDULE ABOVE REFERRED TO.

This should contain the following information, in columns :

Tenants' Names.	Lands to which admitted, and the subject of Commutation.	Date of Admission.

No. 10.—Agreement with two or more Tenants for the Commutation of Manorial Rights, where the Rent-Charge for the Commutation is apportioned by the Agreement (See § 25.)

Manor of }
County of }

Agreement with two or more tenants when the rent charge is apportioned to the agreement.

Memorandum of Agreement made the — day of — 18 — Between A. B., of, &c., lord of the said manor, of the first part; C. D., of, &c., a tenant of the said manor, of the second part; E. F., of, &c., another tenant of the said manor, of the third part [*according to the number of the tenants*], **Witness**, that in pursuance of the powers and authorities for that purpose given in and by an Act passed in the fifth year of the Reign of Her present Majesty Queen Victoria, intituled “An Act for the Commutation of Certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights, and for facilitating the Enfranchisement of such Lands, and for the Improvement of such Tenure,” the said parties above named, lord and tenants of the said manor, to the number of — [*or being all the tenants of the said manor*] [with the consent of the said Commissioners under the said Act, testified by their signatures and seal hereupon written and impressed], do hereby contract and agree for the commutation of the rents, fines, and heriots payable to the said lord in respect of the lands described in the first schedule hereunder written [*here specify any other rights which may be the subject of the agreement*], in consideration of a rent-charge as hereinafter is mentioned [and subject to increase or decrease, as hereinafter mentioned], to be paid in respect of all the said lands described in the first schedule hereunder written, but to be apportioned as hereinafter and therein mentioned, and of a fine certain of the sum of five shillings, to be paid in respect of each and every of the said

lands respectively on the death or alienation of the said several tenants parties hereto. And it is hereby agreed that such rent-charge shall be the sum of — pounds,* but shall be variable from time to time, according to the price of corn, as in the said Act mentioned or provided; and that the same sum of — pounds shall be apportioned in respect of the several lands at the several sums mentioned in the said first schedule, and that such apportioned sums in respect of each of such lands shall be deemed the commutation rent-charge, payable in respect thereof, as fully to all intents and purposes as if each of such rent-charges or apportioned sums had been fixed and agreed on between the said (lord) and the tenant standing admitted to the lands in respect of which the same are so respectively apportioned. And it is hereby agreed that such rent-charge and apportionment thereof respectively shall commence from the — day of — and be respectively payable [to the said A. B., and other the lord and lords, lady and ladies, of the said manor for the time being], half-yearly, on the first day of July and the first day of January for ever hereafter, and that the first payment shall be respectively made on the — day of —. And it is hereby agreed that the fees payable to the steward of the said manor from and after the confirmation of these presents, shall not exceed the scale in the said second schedule hereunder written. As witnesses the hands of the said parties the day and year first above written.

* This will be a variable corn-rent. See § 36.

THE FIRST SCHEDULE ABOVE REFERRED TO.

This should contain the following information in columns:—

Tenants' names.	Lands to which admitted, and the subject of commutation.	Date of admission.	Sum apportioned in respect of each tenement.

THE SECOND SCHEDULE ABOVE REFERRED TO.

[Scale of Stewards' Fees.]

12. The act then gives facilities to enfranchisement, which is¹⁰² “the changing of the *tenure* from base to free,” and is effected by “the lord’s conveying himself, and no one in trust for him, by a common-law deed to the tenant, or to a stranger, who then conveys to the tenant the fee-

(102) 1 Watk. Cop. c. x.

Enfranchisement described.

simple in the freehold of the particular and specific premises, which were held by copy,¹⁰³ or by releasing to the tenant his seignorial rights.”

Both tenures cannot subsist together, and, by consequence, the less worthy must merge; the base is therefore absorbed in the free.

But the enfranchisement shall be for the benefit of those in remainder, who would have taken the copyhold interest had the enfranchisement never taken place, as well as for that of the particular tenant himself; and a court of equity will accordingly direct a conveyance from the heirs at law of the particular tenant to him in remainder, on his paying a proportionate part of the consideration advanced for the enfranchisement.

Enfranchisements are purely voluntary, being neither compulsory on the lord nor on any portion of the tenants.

13. If a copyhold estate be enfranchised by a tenant in tail, the issue in tail are barred.¹⁰⁴ The remainder-men are also barred by the enfranchisement of the tenant in tail in possession.¹⁰⁵

Its consequences.

Immediately on the lands being enfranchised in fee, they become severed from the manor, and held of the lord paramount, under the same tenure and services as the former or mesne lord held. The tenure, therefore, being extinct

(103) For if the *whole manor* descend or be conveyed to the copyholder, it will not be properly an enfranchisement of the copyhold, but an extinguishment of it, and the premises may be granted by copy again.

By the conveyance of the freehold of the specific lands, they become severed from the manor; but it is otherwise when the *whole manor* is conveyed. In the latter case the freehold is not affected; and the copyhold tenure is only extinguished by reason of the impossibility of the same person's being tenant and lord. The lord cannot hold of himself. The copyhold tenure, therefore, which before subsisted, is gone; but no alteration takes place as to the freehold tenure. The tenure, as to the lord above, remains as before: and the lands may be re-granted by copy. 1 Wat. Cop. p. 561.

(104) *Parker v. Turner*, 1 Vern. 393; also 3 Ves. 127, and 3 P. Wms. 10.

(105) 1 Scriv. Cop. 555.

as to the enfranchising lord, he cannot, consequently, reserve to himself any services or right of escheat on such enfranchisement. As the premises are absolutely severed from the manor, and the tenure changed into frank-fee, all customs which attached to copyhold tenure, within the manor of which they were before held, must of necessity have ceased with respect to them. So all rights and privileges annexed to the copyholder's estate, as such, must also be done away; as the estate by copy to which they attached has ceased to exist.¹⁰⁵

14. To enable lords and tenants of manors to effect either general or partial enfranchisements, the lord, with the consent of the Copyhold Commissioners, may enfranchise all or any of the lands holden of his manor, in consideration of such money, whether payable forthwith or at a future time, as shall be agreed to be paid by the tenants whose lands are to be enfranchised; and any tenant, with the like consent of the commissioners, may accept such enfranchisement on the terms so agreed on; and whenever so many as twelve persons being tenants; or all the tenants, shall agree with the lord for the enfranchisement of their lands, then such enfranchisement may be effected by a schedule of apportionment specifically agreed upon between the lord and tenants, and where none such shall have been agreed upon, then by a schedule of apportionment prepared by the steward and delivered to the commissioners, such schedule to be in either case afterwards confirmed and sealed by such commissioners; and such schedule shall state the sums to be paid for enfranchisement by the several tenants, or charged on their respective lands, and the periods of the payment of the principal money respectively, or the commencement of interest, either pursuant to some apportionment to be made by valuers to be appointed by the lord and tenants, parties to the agreement,

Power afforded by the act to effect voluntary enfranchisement.

(105) 1 Wat. Cop. p. 561.

or as shall seem just to the commissioners ; and where any compensation shall have been agreed to be paid to the steward or other officers of the manor for the loss he or they may sustain by such enfranchisement, which compensation shall in all cases be provided for where a steward shall hold his office by patent or other instrument for the term of his life or during good behaviour, or where, in the absence of such patent or other instrument the usage shall have been such as in the opinion of the commissioners to lead to a just expectation that the steward will hold his office during life or good behaviour, the schedule shall contain an apportionment of the sum agreed to be paid ; and every such schedule shall contain all such other matters as shall be requisite for carrying into effect the provisions of this act ; and all the provisions for carrying into execution a commutation apportionment made by valuers shall, so far as the same are capable of application, be applicable to the case of an enfranchisement, save that the commissioners shall not make any alterations or amendments in such schedule without the consent of the parties interested : Provided always, that whenever the estate of any party to such enfranchisement shall be less than an estate of fee simple in possession, or corresponding copyhold or customary estate, notice in writing shall be given by or on behalf of such party to the person entitled to the next estate of inheritance in remainder or reversion in the manor or land to be affected by such enfranchisement, so that the assent or dissent or acquiescence of such person entitled in remainder or reversion may be stated in writing to the commissioners, when such a schedule of apportionment as aforesaid, or when the assurance shall be sent to them ; but the commissioners shall notwithstanding cause such further notices to be given and such other inquiries to be made as they shall deem fit before confirming such apportionment, or consenting to such conveyance, deed, or assurance : Provided also, that in case the person so next entitled in remainder or reversion as aforesaid, shall be a

minor, idiot, lunatic, *feme covert*, or under any other legal disability, or shall be beyond the seas, such notice as afore-said shall be given to the guardian, trustees, committee of the estate, husband or attorney of such person respectively, or in default thereof, or in case the person so entitled shall be unknown or not ascertained, then such notice shall be given to some person, to be nominated for that purpose by some writing under the hands and seal of the commissioners, after due inquiry shall have been made by them as to the fitness of such person to judge of the propriety of assenting to or dissenting from any such agreement; and that in every case in which dissent in writing shall have been expressed, the commissioners shall withhold their confirmation of the apportionment, or their consent to the assurance, until upon further inquiry they shall be satisfied that the agreement is not fairly open to objection.

If such agreement for enfranchisement shall not be entered into by all the tenants of the manor, or their number shall be less than twelve, or, whatever may be their number, if the parties shall think fit, an enfranchisement may be effected, with the consent of the commissioners, by such assurance as would be adopted for effecting it, if the lord were seised of the manor for an absolute estate of inheritance in fee simple in possession.

The commissioners, before giving their consent, to satisfy themselves, upon the written request of any three or more tenants, parties to the agreement, but not otherwise, of the title to the manor; and the expenses of the investigation, as well as the general expenses, to be borne by the parties as may be agreed upon, and in default as the commissioners shall direct. (§§ 56—58.)

15. Whenever by any agreement which shall be proposed to be carried into effect by a schedule of apportionment, it shall have been stipulated that any tenant shall be at liberty to defer the payment of a portion of the sum

The deferring of the payments, substituted titles.

charged in respect of his lands or any portion thereof, and such tenant shall give notice under his hand to the steward or lord, as hereinbefore directed with respect to notices in cases of commutation, of his desire to defer payment accordingly, at any reasonable time after the execution of any such agreement for enfranchisement, and before the delivery of the schedule to the commissioners, the commissioners may in their schedule of apportionment in every such case, and also (with the consent of the lord) in the case of any such tenant giving notice as aforesaid, although no stipulation shall have been made by the agreement, award that so much of the sum apportioned to any such tenant as shall have been charged for enfranchisement from fines or other manorial rights to which such tenant, if he possessed a life or other limited interest, would not have been liable thereafter during his tenancy, shall not be paid until the period of the next act or event on which a fine or other such manorial right would have become payable or due to the lord if the said lands had remained unenfranchised, and that within six months after such act or event the said sum shall become payable, with such addition thereto as the said commissioners shall direct.

When such sum becomes due, the lord is to be entitled to the rent and profits of the land, and may proceed to obtain possession. For the purpose of freeing other tenants from the inconvenience to which in certain cases they might be subjected by an immediate liability to the payment of the sums to be agreed to be paid to the lord of the manor for enfranchisement under this act, it shall be lawful for such tenant, at any reasonable time after the execution of any such agreement for enfranchisement as aforesaid (to be fixed by the said commissioners, and in default of their fixing any other limit at any other time, or until within ten days next previous to the delivery by the steward to the commissioners of the schedule of such apportionment) to declare, by notice under his hand, to be delivered to the

lord or steward, as herein-before provided with respect to notices in cases of commutation, his desire that such compensation money should remain a charge on the lands affected thereby for any number of years not exceeding fourteen years, or, if a tenant for life, for the whole period of his life and one year longer, and which notice the steward shall forthwith, or with the said schedule of apportionment, send to the commissioners; and thereupon the said commissioners, with the consent of the lord, but not otherwise, shall insert in a column of such apportionment to be appropriated to such purpose the number of years or period for which such charge is to be continued, and thereupon (subject as after mentioned) no proceedings shall be instituted during such time or period to enforce payment of the principal money so apportioned: Provided, nevertheless, that interest after the rate of four pounds *per centum per annum* thereon shall be payable and paid half-yearly on the days to be mentioned in such apportionment, or, if not mentioned, then at the expiration of each half year computed from the date thereof; and nothing herein contained shall extend to protect any tenant or other person from such proceedings, in case interest for one year and a-half shall remain due on the principal sum apportioned or awarded, or on any part thereof to the amount of one half: Provided also, that during the term or period so fixed the lord shall not be compellable to receive payment of the principal money without receiving twelve calendar months notice of the intention to pay off the same; and in case the interest on such principal sum or any part thereof shall at any time be in arrear or unpaid for thirty days after any half-yearly payment shall be due as aforesaid, it shall be lawful for the lord or party entitled for the time being to receive such interest money to levy the same by distress and sale of the goods on the lands and tenements enfranchised and affected by such enfranchisement, or any of them, as fully and in like manner

as if the same had been rent in arrear, and subject to recovery by distress. Where payments are deferred by tenants, provision to be made for such lords as are only tenants for life. All land enfranchised under this act shall be deemed to be held under the same title as that under which the same were held at the time of such enfranchisement, and shall not be subject to any estates, rights, titles, interests, incumbrances, claims or demands affecting the manor of which the same were holden. (§§ 60—64.)

General expences, and their recovery.

16. The expences of valuations, including the expence of making copies of apportionments, schedules, and all other documents required under the provisions of this act, and all other expences necessary in the making any commutation or enfranchisement as aforesaid, except when otherwise provided, shall be paid by the tenants, or by the tenants and lords, in such proportions as the commissioners shall in the confirmed apportionment, or otherwise, under their hands and seal, direct; and that if any difference shall arise touching the amount of the said expences, or the share thereof to be paid by or to any person, it shall be lawful for the commissioners or assistant commissioner to certify under their or his hands or hand the amount to be paid by or to such person; and in case any person shall refuse or neglect to pay the amount so certified or specified in such apportionment to be payable from him immediately after notice thereof, then, upon production of such certificate, or of either of the deposited copies, under seal, of the said apportionment, before two of her Majesty's justices of the peace for the county, riding, division, or jurisdiction wherein the manor to which the same relates, or the greater part thereof in value as appearing in such apportionment, is situate; and on proof of such refusal or neglect such justices are hereby authorised and empowered, by warrant under their hands and seals, to cause the same, and the costs of application and distress, to be

levied by distress and sale of the goods of the person liable to pay the same, and to render the surplus (if any), after deducting the costs of distress and sale, to the person distrained upon. If such expences shall not be levied under the said distress within two months after the said warrant shall be granted, it shall be lawful for the person entitled to the said expences (if the same shall, with the costs of application to such justices, amount to forty shillings or upwards), and his executors or administrators, to recover the same expences and costs, with full costs of suit, in an action of debt in any of her Majesty's courts of law at *Westminster* against the party named in such warrant and certificate or apportionment as aforesaid, his executors or administrators, in which action such certificate or deposited copy of apportionment shall be satisfactory evidence of the amount of such expences so awarded by the said commissioners or assistant commissioner, and of the same being due for and to the parties therein named; and the certificate of such justices under their hands on such warrant shall in like manner be evidence of the amount of costs of such application; and the production of such warrant (which in all such cases shall be allowed, and such certificate given by such justices,) shall be satisfactory evidence of the non-recovery of such expences and costs respectively under a distress. Every tenant, being a trustee, or not beneficially interested in the lands of which he stands admitted tenant to be affected by any commutation or enfranchisement under this act (save as against an unadmitted mortgagee), shall be entitled to recover in like manner, by distress or action respectively, all expences, costs, and charges which he may have to pay under or by reason of any such certificate, apportionment, distress, or action, from the person beneficially interested at the date of such apportionment in the said lands, his executors, administrators, or assigns, or by a like distress on the said lands, and the occupier thereof shall be entitled

to deduct any such payments out of any rent then or subsequently due; and should any dispute arise as to any trusteeship or right to such recovery, the same shall be determined by the commissioners or assistant commissioner in like manner as is herein-before provided with respect to other causes of dispute or difference arising under this act, and their or his certificate shall be deemed satisfactory evidence of the facts therein stated; and the like evidence shall be produced before such justices or in such action as is herein-before provided in other cases of distress. Any tenant having a limited interest, and who shall pay any such expences or costs, may, with the consent of the commissioners under their hands, and by a simple entry on the court rolls of the manor (and for which entry the steward shall only charge thirteen shillings and fourpence, and which shall not be subject to any stamp duty,) charge such expences and costs, with interest thereon at the rate of four pounds *per centum per annum*, on the copyhold lands to which the same shall relate, but so nevertheless that the principal charge on such lands shall be lessened in every year following such charge by one twentieth part at least of such original charge thereon, and shall be subject to previous mortgages. Any lord of a manor having a particular interest, or being a trustee, and who shall (in the case of a commutation) pay any such expences or costs, may, with the like consent of the commissioners, charge such expenses and costs, together with the expences he may reasonably incur in employing agents to protect his interests or otherwise, with interest thereon at the rate of four pounds *per centum per annum*, on the manor to which the same may relate, but so nevertheless that the principal charge on such manor shall be lessened in every year following such charge by one twentieth part at least of such original charge thereon, and shall be subject to previous mortgages: Provided always, that the amount of such last mentioned expences shall have been

previously submitted to and shall have received the approval of the commissioners or of an assistant commissioner. The lands are to be charged with enfranchisement considerations as on mortgage in fee. Such sums to be first charges on the lands, and to have priority. (§§ 65—71.)

17. Any tenant whose lands shall be enfranchised may charge the same (or any of them, provided he shall hold the whole thereof under the same right and the same estate,) with the payment of such sums as aforesaid (and the costs of such charges), and lawful interest thereon respectively, to any person who shall advance and lend such sums on the security of the lands so to be charged, and his executors, administrators, and assigns, and for securing the payment thereof, with such interest, to demise the said lands by way of mortgage for any term of years to the person who shall lend such sums, his executors, administrators, and assigns, or to such other person as he or they shall appoint, so as such demise be made with a proviso or condition declaring that such term shall be void on payment of the amount thereby secured, with interest thereon, at a time to be therein appointed; and such charge shall have the like priority with the original charge under this act, and with the powers and rights to which a first mortgagee would as mortgagee by demise be entitled. (§ 72.)

Power to mortgage.

Provisions are made for the disposal of the money for enfranchisement, where the lord of the manor has a limited estate, or is under disability; and also for payment to the stewards. (§§ 73—78.)

18. From and after the final confirmation of the apportionment, in the case of any commutation under this act, or upon the execution of the deed whereby any voluntary commutation may have been effected, the several lands in-

How commuted lands are to be held, and their mode of descent.

cluded in such commutation shall be held by copy of court-roll, and shall be conveyed by surrender and admittance, in all cases in which the same shall have been previously so held and conveyed respectively, and in all other cases shall be held and conveyed in such manner as the same are now by custom held and conveyed, and shall continue parcel of the same manors as such lands would have been held of if such commutation had not taken place, *but* the same lands shall thenceforth cease to be subject to the customs of borough English or gavelkind, or to any other customary mode of descent, or to any custom relating to dower or freebench or tenancy by the curtesy of England; and all the laws relating to descents, or to estates of dower, or estates by the curtesy of England, which shall for the time being affect and be applicable to lands held in free and common socage, shall thenceforth affect and be applicable to the lands included in every such commutation: Provided always, that nothing herein contained as to curtesy or dower or freebench shall extend or be applicable to the case of any husband or widow who shall have been or shall be married before the final confirmation of the commutation apportionment, or the execution of such deed as aforesaid, or to alter or lessen, or in any way affect, any right which the husband or widow of any person who shall be tenant of a manor at the time of the confirmation of the said apportionment would or might have had if such commutation had not been made. The custom of gavelkind in Kent is exempted from the operation of this act. No commutation under this act shall operate to affect any rights of lords of manors to escheats, fairs, markets, appointments, franchises, royalties, rights, liberties, and privileges of chase and free warren, hunting, hawking, fowling, and of chasing and killing game and beasts of chase and free warren, and all ancient piscaries, fisheries, and rights of fishing, or any rights in any mines and minerals or quarries within or under the said lands and heredita-

ments, or any other manorial rights whatever, unless expressly commuted under this act: Provided always, that nothing in this act contained shall operate to authorise or empower any lord of any manor to enclose any common or waste lands or any part thereof. Power is then given to tenants to grant rights of way, &c. to lords of manors for mining purposes. (§§ 79, 80, 82 and 84.)

19. In case of any enfranchisement under this act, from and after the final confirmation of the apportionment, or the execution of the conveyance, (as the case may be), the several lands therein respectively comprised and enfranchised shall become and be in all respects of freehold tenure, but subject to the payment of the enfranchisement consideration in favour of the lords and steward or other officer as aforesaid; and all mortgages affecting the same shall be deemed and become mortgages of the freehold of the same lands for a corresponding estate, if such enfranchisement consideration shall be paid off, and if not so paid off, mortgages of the equity of redemption thereof, subject to such mortgage interest as aforesaid for securing such consideration: Provided always, that nothing herein contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto notwithstanding the same shall become freehold: Provided also, that no such enfranchisement or conversion into freehold shall affect, except as aforesaid, any mortgage, or defeat the beneficial limitations of any will or settlement theretofore executed, or alter the descent or distribution of any estate or interest in land on the decease of any tenant or person entitled thereto in possession or remainder at the time of such enfranchisement or conversion. (§ 81.)

The effect of
an enfran-
chisement.

All documents under the act are exempt from stamp duty; actions against commissioners or others to be brought within three calendar months after cause of action arises,

giving a written notice thereof twenty-one days before ; and no proceedings under the act are to be quashed for want of form, or removed by *certiorari*. (§§ 93, 95, 96.)

The 6 & 7
VICT., c. 23.

20. The 6th and 7th Vict. c. 23, extends the provisions of the 4th & 5th Vict. c. 35, in the following particulars :—

In addition and subject to the provisions contained in the said act, any enfranchisement made under the same may be made, either wholly or in part, for the consideration of a grant of an annual rent in fee to be thenceforth charged on and issuing out of the lands enfranchised, such annual rent to be valued in like manner and to be subject to the like variation as the commutation rent-charge under the provisions of the said act ; and that, in addition and subject to the provisions contained in the said act, any commutation or enfranchisement made under the same may be made, either wholly or in part, for the consideration of a conveyance of lands parcel of the said manor as the lands commuted or enfranchised, and subject to the same uses and trusts as the lands commuted or enfranchised shall be subject to at the time of such commutation or enfranchisement, or any right to mines or minerals in or under such lands, or any right to waste in lands belonging to such manor. (§ 1.)

The nine following sections contain enactments as to such annual rent or conveyance of part of the lands. (§§ 2—10.)

It is provided by the said act that whenever so many as twelve persons being tenants or all the tenants of any manor shall agree with the lord for the commutation or enfranchisement of their lands, it shall be lawful to effect such commutation or enfranchisement by a schedule of apportionment ; and it is desirable to permit a schedule of apportionment to be adopted when a less number of tenants of any manor than twelve are desirous of effecting a commutation or enfranchisement ; be it enacted, That it shall

be lawful to effect a commutation or enfranchisement by a schedule of apportionment, in the manner provided by the said act, whenever so many as six persons being tenants of any manor shall at the same time agree with the lord for the commutation or enfranchisement of their lands. (§ 11.)

The remaining sections provide (amongst other things) for the payment of fee-farm rents, and dispense with notice to expectants, when the whole expense of enfranchisement is borne by the particular tenant. (§§ 12—16.)

21. The 7th and 8th Vict. c. 55, amends and explains The 7 & 8
Vict., c. 55. the two former acts, by enacting (§ 1) that the provisions of the aforesaid acts, or either of them, as to the recovery of expenses, costs, and charges to be paid by any tenant, being a trustee, and not beneficially interested in the lands of which he stands admitted tenant, to be affected by any commutation or enfranchisement under the aforesaid acts or this act, shall extend as well to cases in which there shall not be an apportionment on commutation or enfranchisement in pursuance of the aforesaid acts or this act, as to cases in which there shall be an apportionment or commutation or enfranchisement in pursuance thereof. (§ 1.)

Every person beneficially interested in the said lands, having a limited beneficial interest only, and who shall pay any such expenses, costs, and charges to any tenant, being such trustee as aforesaid, may, with the consent of the Copyhold Commissioners under their hands, and by a simple entry on the court-rolls of the manor, and for which entry the steward shall only charge thirteen shillings and fourpence, and which shall not be subject to any stamp duty, charge such expenses, costs, and charges, with interest thereon at the rate of four pounds *per centum per annum*, on the lands to which the same relate; but so, nevertheless, that the principal charged on such lands be lessened in every year following such charge one twentieth

at least of such original charge, and shall be subject to previous mortgages. (§ 2.)

And as to any lands to be affected by any commutation or enfranchisement without apportionment under the aforesaid acts or this act, or any of them, of which the tenant being a trustee, and not beneficially interested therein, stands admitted tenant, the person beneficially interested therein at the date of the confirmation of the commutation agreement, or at the date of the conveyance, deed, or other assurance by which the enfranchisement is made, as the case may be, shall be deemed, for all purposes in regard to expenses, costs, and charges which any such trustee may have to pay under the aforesaid acts or this act, to be the person beneficially interested in such lands within the meaning of the aforesaid acts and this act respectively. (§ 3.)

The provisions of the aforesaid acts, or either of them, charging and securing, and authorizing the charging and securing of the consideration money of any enfranchisement under the said acts, and the costs of the charges, with interest, and also as to priority of the charges and securities of or for the same, and otherwise in reference thereto, shall, *mutatis mutandis*, extend as well to cases in which there shall not be an apportionment or enfranchisement in pursuance of the aforesaid acts or this act, as to cases in which there shall be an apportionment or enfranchisement in pursuance thereof; and on any enfranchisement where there shall not be such apportionment the charge of the consideration money of the enfranchisement, and the interest thereon, shall commence and be computed from the date of the conveyance, deed, or assurance by which the enfranchisement shall be made. In addition and subject to the provisions of the aforesaid acts, or either of them, any commutation or enfranchisement may be made wholly or in part for the consideration of a conveyance in lands, or of any right to

mines or minerals, although the said lands or the said right to mines or minerals so to be conveyed shall not be parcel of or situate in or under the lands of the same manor as the lands so to be commuted or enfranchised, provided that the said lands or the said right to mines or minerals can be conveniently held with the same manor in the opinion of the Copyhold Commissioners, and are subject, so far as the difference of tenure may permit, to the same uses and trusts as the lands so to be commuted or enfranchised shall be subject to at the time of such commutation or enfranchisement, or to uses and trusts in correspondence with which the said lands shall be then settled at law or in equity; and that it shall be lawful for the person empowered by the aforesaid acts to obtain such commutation or enfranchisement to convey the said lands or rights to mines and minerals to the person commuting or enfranchising the lands proposed to be commuted or enfranchised, and to his heirs, to the uses, and upon and for the trusts, intents, and purposes, to, upon, and for which the manor of which the lands commuted or enfranchised are parcel shall be subject and held at the time of such commutation or enfranchisement; subject always, as to any leases to which such lands may be subject, to all the provisions of the last-mentioned act in respect to lands therein permitted to be conveyed. In case any trustee nominated by the Copyhold Commissioners under the aforesaid acts or this act should be desirous of resigning, or should become incapable of acting, the Commissioners may, if they shall think proper, appoint some other fit person in like manner as if a vacancy had occurred under the provisions of the secondly herein-before recited act. [6 & 7 Vict., c. 23.] The provisions of the said first herein-before recited act, [3 & 4 Vict., c. 35,] authorizing distress and entry in cases of non-payment of the rent-charge authorized by the aforesaid act to be granted, shall extend and be applicable to all rent-charges granted and made payable under and by virtue of the said secondly herein-before re-

cited act or this act. This act shall be taken and construed to be part of the aforesaid acts, and that all proceedings which may have been had, and all commutations and enfranchisements which may have taken place, under the said recited acts or either of them, and all matters and things incident thereto, shall be of the same force, validity, and effect as if the provisions of this act had been contained in the said first-recited act. (§§ 2—8.)

Official statement of the commissioners as to the terms of enfranchisement.

22. The experience of the Copyhold Commissioners enables them now to state that enfranchisements are very usually made on something like the following terms. The Commissioners are aware that the terms stated may not accurately apply to any given cases, but still they have been found to be of service to parties desirous of carrying the act into execution. Such parties have, of course, the power of adjusting them to the particular circumstances of their own dealings.

Twenty-five years for quit rent.

Copyhold of inheritance (fines certain)—one year's value.

Copyhold of inheritance (fines arbitrary)—four to six years' value.

Copyhold for three lives—six years' value.

Copyhold for four lives—four years' value.

Heriots—Two heriots and a half on the average of the three last heriots.

The Commissioners are of opinion that the compensation to stewards ought in no instance to exceed one set of

fees, which is to pay all charges for the instruments necessary to complete the enfranchisement.

N.B. These terms as to copyholds for lives are based less on the actual experience of the Commissioners than on examples of the records of transactions in the redemption of land-tax. It is obvious that the different ages of existing lives must vary the terms of such bargains.¹⁰⁶

23. A form of agreement to enfranchise, and a schedule of apportionment on enfranchisement, are given in Nos. 11 and 12 (*post*, p. 308, *et seq.*)

Forms of procedure with directions.

Although the act authorizes the use of partial agreements without schedules of apportionment annexed, it will be very rarely indeed advisable to use such. Parties who agree to commute or enfranchise, and embody the consideration to be paid by each in a schedule forming part of the instrument itself, will at once close the whole transaction.

Those who leave a gross sum to be paid to the lord as a consideration, to be afterwards apportioned among them by others, may involve themselves in subsequent valuations and instruments of apportionment and investigations, and perhaps conflicts, of which the expense, the delay, and the trouble may be alike formidable. It may again be remarked here, that even where the copyhold or customary lands of a whole manor are commuted or enfranchised, the parties may possibly, in some few cases, agree among themselves as to the consideration to be paid by each, and then the commutation or enfranchisement may at once be effected by an instrument in one of the

(106) The Commissioners have published a paper containing tables of terms on which an enfranchisement may be made, with suggestions for general rules; as it can be procured from their office, it is unnecessary for us to give the lengthy document, since it would take up space which may be more usefully filled.

forms (Nos. 10, *ante*, p. 288, or 12, *post*, p. 310), instead of a manorial agreement in the form No. 5, *ante*, p. 284; and if such an instrument, including a schedule of apportionment in the form (Nos. 10 or 12), can be adopted, it is obvious that much of the trouble and expense will be avoided which will attend the completion of an apportionment consequent on a manorial agreement, or consequent on partial agreements, containing no schedules of apportionments.

When either lords or tenants are under disabilities, or when they have only a limited estate, such as an estate for life, &c., then it becomes the duty of the commissioners to protect the interests of other parties, who are or may hereafter be interested in the property.

In such cases, before confirming deeds or partial agreements, the commissioners will require to know both the value of the property and the nature of the incidents to which it is subject; and to obtain that knowledge they will require declarations from the steward and a valuer—of which declarations the forms are given in Nos. 14 and 15, (*post*, pp. 313 and 314.)

When parties enfranchise by a schedule of apportionment (see No. 12), they may find it useful, although not absolutely necessary under the act, previously to sign an agreement, of which a form is given in No. 13 (*post*, p. 311.)

No. 11.—*Agreement with Six or more Tenants for the Enfranchisement of certain Lands where the Consideration for enfranchising is not apportioned by the Agreement, but is left to be apportioned by the Steward.*—See 4 and 5 Vict., c. 35, § 56, and 6 and 7 Vict., c. 23, § 11.

Manor of }
County of }

Memorandum of Agreement, made the — day of — 18 —, Between A. B., of, &c., lord of the said manor, of the first part; C. D., of, &c., a tenant of the said manor, of the second part; E. F., of, &c., another tenant

of the said manor, of the third part, &c. [according to the number of the said tenants], **Witness**, that in pursuance of the powers and authorities for that purpose given in and by an act passed in the fifth year of the reign of her present Majesty Queen Victoria, intituled, “An Act for the Commutation of certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights, and for facilitating the Enfranchisement of such Lands, and for the Improvement of such Tenure,” the said parties above named, lord and tenants of the said manor, to the number of — [or being all the tenants of the said manor], do hereby contract and agree for the enfranchisement of the lands described in the schedule hereunder written [or as the case may be], in consideration of a sum to be paid in respect of the said lands described in the schedule hereunder written, to the said A. B., his executors, administrators, and assigns; or in consideration of a rent-charge to be paid in respect of all the lands described in the schedule hereunder written. And it is hereby agreed that such rent-charge shall be the sum of — pounds,* but shall be variable from time to time according to the price of corn, as in the said Act mentioned and provided: And it is hereby agreed that such rent-charge shall commence from the — day of —, and be respectively payable to the said A. B. [and other the lord and lords, lady and ladies of the said manor for the time being] half-yearly, on the first day of July and the first day of January for ever hereafter, and that the first payment shall be made on the — day of —.

As witness the hands of the said parties, the day and year first above written.

* This will be a corn-rent, see 6 and 7 Vict., c. 23, § 1.

THE SCHEDULE ABOVE REFERRED TO.

This should contain the following information in columns:—

Tenant's names.	Lands to which admitted, and the subject of enfranchisement.	Date of admission.	Sum or Rent to be paid for Enfranchisement.

No 12.

[By sect. 56, 4 & 5 Vict., c. 35, and sect. 11 of 6 & 7 Vict., c. 23 an Enfranchisement by Six or more Tenants may be effected without a formal Agreement, by a Schedule of Apportionment such as is hereunder given.]

Manor of _____ in the County of _____

A SCHEDULE OF APPORTIONMENT of the payments to be made in pursuance of an agreement come to for the Enfranchisement of certain lands held of the above Manor, pursuant to an act passed in the fifth year of the reign of her present Majesty Queen Victoria, intituled "An Act for the Commutation of certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other lands subject to such rights, and for facilitating the Enfranchisement of such Lands, and for the Improvement of such Tenure.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24
No.	Names of Tenants.		Residences.		Description.	Payment to the Lord for Enfranchisement from						Payments to Steward.		Costs.			Total Payments.	Date of payment to Lord.	Signature or Initials of Lord.	Date of Payment to Steward.	Signature or Initials of Steward.	No. of years or period for which payment of money to be postponed, instalments to be paid Half-yearly, &c.	Other Matters.
						Quit Rents, Free Rents, &c.	Fines and Reliefs.	Heriots.	Rights in Timber.	Other Manorial Rights in Agreement.	Total.	Compensation.	Costs.	Valuers.	Apportionments.	Other Costs.							
						£s.d.	£s.d.	£s.d.	£s.d.	£s.d.	£s.d.	£s.d.	£s.d.	£s.d.	£s.d.	£s.d.	£s.d.						

We, whose hands and seals are hereunto subscribed and attached, being the Commissioners acting in the execution of the powers given under the

above Act, do order the several sums above specified to be paid by the respective persons against whose names the same are inserted in the above Schedule of Apportionment. And we do direct that the several sums [or rents] therein mentioned as payments to the lord shall be paid to ——. And we do direct that the several sums therein mentioned as payments to the steward shall be paid to — of, &c, his executors or administrators, or to such person as he or they shall from time to time under his or their hand or hands appoint. And we direct that the sums therein mentioned as valuer's costs shall be paid to — of, &c., or to such other person as — and — the valuer or the survivor, his executors or administrators, shall from time to time under their or his hands appoint. And we direct that the sums therein mentioned as costs of apportionment shall be paid to — of, &c., or to such other person as we shall from time to time under our hands appoint. And we do hereby confirm the above Schedule of Apportionment.

Given under our hands and seals the — day of —, A.D., —.

A. C.	}	L. S.
B. C.		
C. C.		

No. 13.—Agreement with Six or more Tenants for the Enfranchisement of certain Lands, where the consideration for Enfranchisement is intended to be apportioned by the Parties.

[Parties who find it convenient to execute an agreement as a foundation for such a schedule of apportionment as is given in No. 12, may, if they please, use the following Form.]

Manor of }
County of }

Memorandum of Agreement made the — day of — **Between** A.B., of, &c., lord of the said manor, of the first part; C. D., of, &c., a tenant of the said manor, of the second part; E. F., of &c., another tenant of the said manor, of the third part, &c. [according to the number of the said tenants], **Witness**, that in pursuance of the powers and authorities for that purpose given in and by an act passed in the fifth year of the reign of her present Majesty Queen Victoria, intituled "An Act for the Commutation of certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights, and for facilitating the Enfranchisement of such Lands, and for the improvement of such Tenure," the said parties above named, lord and tenants of the said manor, to the number of — [or being all the tenants of the said manor], do hereby con-

Agreement
with six or
more tenants.

COPYHOLDS, CUSTOMARY FREEHOLDS,

tract and agree for the enfranchisement of the lands described in the schedule hereunder written, and that they will effect such enfranchisement by a schedule of apportionment to be hereafter prepared. And that the consideration for such enfranchisement shall be the sum of ——. *As witness* the hands of the said parties, the day and year first above written.

THE SCHEDULE ABOVE REFERRED TO.

This should contain the following information in columns :—

Tenants' names.	Lands to which admitted, and the subject of enfranchisement.	Date of admission.

No. 14.--*Declaration by Steward as to Value and Incidents.**Manor of, &c.*

SCHEDULE of the several particulars required by the Copyhold Commissioners, with respect to certain copyhold or customary lands, proposed to be commuted (or enfranchised).

1	2	3	4	5	6	7	8	9	10
Names of tenants.	Copyholders, customary tenants, or freeholders.	Residences.	Description.	Ages	When more than one tenant, whether admitted as joint tenants, or how otherwise.	Descriptions of tenements on court rolls.	Copyhold, customary, or freehold.	Parish or parishes in which situated.	If assessed to poor-rate jointly with other property, enter quantity of property in assessment (as to tenements subject to fines depending on annual value.)

11	12	13	14	15	16	17	18	19
Total assessment.	Annual value of quit rents or free rents.	Whether tenements held at fines arbitrary on deaths or alienation at fines certain, and what amount, or how otherwise, and amount of relief, and when payable.	Whether subject to heriots, and how.	Amount received for each of the three last heriots for each tenement.	Whether subject to rights in timber, and what.	Peculiar customs.	Changes in tenants during last years, where fines payable on death or alienation.	Other remarks.

I declare the above to be a true and correct statement, according to my judgment and belief, of the several matters and things above mentioned.

(Dated, &c.)

(Signed) . . A.B., Steward of the said Manor.

the said manor, of which the picce or parcel of land or garden ground and hereditaments hereinafter described and hereby granted and released, or intended so to be, is part, To hold the same unto the said —, his heirs and assigns for ever, according to the custom of the said manor, by the yearly rent of —, and services therefore due and accustomed; And the said — still remains the tenant of the said copyhold hereditaments;

And Whereas the said —, under the authority of the acts of parliament hereinafter referred to, has contracted and agreed with the said — for the enfranchisement and sale to him of the said lands and hereditaments hereinafter described, and of the yearly rent of —, as an apportioned part of the said yearly rent of —, and all fines and other emoluments and advantages issuing and payable from and in respect of the said copyhold hereditaments and premises, or incident thereto or accruing therefrom, for the sum of —; And the said Copyhold Commissioners have agreed to consent to such enfranchisement:

Now this Indenture witnesseth, that in consideration of the sum of — of lawful money of Great Britain, at or immediately before the execution of these presents paid by the said —, by the direction and at the option of the said — (testified by their common seal being affixed to these presents), to —, of —, trustees respectively nominated as well by the said Copyhold Commissioners by this present deed under their hands and seal, as by the said —, to receive the same money (the payment of which sum of — is hereby acknowledged), Then the said —, in pursuance and in exercise and execution of the power or authority to them given under and by virtue of the provisions of an Act of Parliament made and passed in the fourth and fifth years of the reign of her present Majesty, intituled "An Act for the Commutation of certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights, and for facilitating the Enfranchisement of such Lands and for the Improvement of such Tenure," and of all other acts passed to amend, explain, and continue the same, and of all other powers enabling them in this behalf; And in order to enfranchise the said copyhold hereditaments,

Do by these presents, with the consent of the said Copyhold Commissioners (testified by their executing these presents) grant, release, and enfranchise unto the said — and his heirs,

All that piece or parcel of land, &c., &c., &c.

Parcels.

Together with all commons, trees, hedges, ditches, mounds, fences, ways, waters, watercourses, &c., &c., &c., to the same hereditaments and premises belonging or in any wise appertaining,

General words.

And the reversion and reversions, remainder and remainders thereof, and the said apportioned yearly rent or sum of —, and all other emoluments and advantages issuing or payable from or in respect of the said copyhold hereditaments and premises, or incident thereto or accruing therefrom;

Tenendum.

To hold the said copyhold hereditaments hereby granted and released, or intended so to be (freely, clearly, and absolutely enfranchised, acquitted, and discharged for ever by these presents of and from all manner of yearly and other payments, quit rents, or other rents, heriots, fines, suit of court, and all other copyhold or customary payments, duties, services or customs, which, according to the custom of the said manor, the hereditaments and premises hereby granted and released, or any of them, are or have been subject or liable to as copyhold, holden of or as part of the said manor) unto the said — and his heirs ;

Uses and trusts.

To such uses, upon and for such trusts, intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as the said — by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by him duly executed, shall from time to time direct or appoint, and in default of and until such direction or appointment, and so far as no such direction or appointment shall extend,

To the use of the said — and his assigns during his life, and after the determination of that estate by forfeiture or otherwise in his life time,

To the use of the said —, his executors and administrators, during the life of the said —, **In trust** for the said — and his assigns ; and from and after the determination of the estate so limited in use to the said —, his executors and administrators, during the life of the said — as aforesaid, **To the use** of the said —, his heirs and assigns for ever.

Declaration against dower.

And the said — doth hereby declare that no widow whom he may leave, and who shall not be excluded from dower by virtue of the limitations hereinbefore contained, shall be entitled to dower in or out of the said hereditaments and premises, or any part thereof.

Covenant against Incumbrances.

And the said — for themselves, their successors and assigns, do hereby covenant and declare to and with the said —, his heirs, appointees and assigns, that they the said — have not done, committed, or wilfully suffered to be done any act, deed, matter or thing whatsoever, whereby or by means whereof the hereditaments and premises intended to be hereby granted and released, or any part thereof, are, is, can, shall, or may be impeached, charged, or incumbered in any manner howsoever.

Grant by the Copyhold Commissioners.

And for the considerations herein-before expressed, the said —, so far as they lawfully can or may, under or by virtue of the said Act of Parliament of the fourth and fifth years of the reign of her present Majesty, c. 35, hereinbefore referred to, or otherwise, but not by way of warranty, do hereby for themselves and their successors, grant unto the said —, his heirs, appointees, and assigns,

All such commonage, right and title of common, in, upon, and over the wastes, commons, and commonable lands of or belonging to the said —,

as lords of the said manor, as he the said —, his heirs, appointees, and assigns would have exercised, claimed, or been entitled to as a copyhold tenant of the said hereditaments and premises, if these presents had not been made.

In Witness whereof the said — have caused their common seal to be affixed; the said Copyhold Commissioners have set their hand and affixed their seal; and the said — have set their hands and seals, the day and year first above written.

(Signatures, Seals, Attestations, and Receipt affixed.)

(II.)

This second precedent is an enfranchisement in consideration of the grant of a variable rent-charge.

This indenture made the — day of —, 18—, **Between** —, lords Date and parties. of the manor of —, in the county of —, of the first part; The Copyhold Commissioners, acting under the powers and provisions of an act of parliament made and passed in the sessions of parliament held in the fourth and fifth years of the reign of her present Majesty, intituled “An Act for the Commutation of certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands, subject to such Rights, and for facilitating the Enfranchisement of such Lands, and for the Improvement of such Tenure;” and of two other acts, one whereof was made and passed in the sessions of parliament held in the sixth and seventh years, and the other in the seventh and eighth years of the reign of her said Majesty, to amend and explain the said recited act, of the second part; and —, of the third part:

Whereas on the — day of —, now last past, the lords of the said manor of —, by their steward, out of court, in pursuance and under the authority of the said first recited act, did grant in possession unto the said —, and in reversion unto — his daughter, then aged about — years, and —, then aged about — years, at the nomination of the said —, **In** trust for and for the sole use and benefit of the said —, and not by way of advancement or for the benefit of the said lives, **The** [premises]; Recitals: grant for lives.

To hold the said premises, with the appurtenances, unto the said —, and —, **In** trust as aforesaid, for the term of their natural lives, and the life of the longest liver of them successively, at the will of the lords, according to the custom of the said manor, **YIELDING** the yearly rent accustomed, and all other burthen and services theretofore due and of right accustomed; and the said — was admitted tenant.

[And twelve other similar grants of other property.]

And whereas all and singular the said lands, hereditaments, and premises so granted to the said — as aforesaid, are held by thirteen copies of How held, where situated, and to

what quit-
rent subject ; court-roll of the said manor, numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, 9,
10, 11, 13, and 14, and are situate within the parish and manor of —
aforesaid, and subject to the payment of the quit-rent to the said — of
—l. ;

Agreement
to enfran-
chise ;

And whereas the said —, as the lords of the said manor, have in pur-
suance of the powers and provisions in this behalf contained in the said re-
cited acts, agreed with the said — for the enfranchisement of all and
singular the said lands, hereditaments, and premises comprised in the here-
inbefore recited grants, and which are particularly described in the Schedule
hereunder written, with the appurtenances, and for their release and dis-
charge from the said quit-rents and all other rents payable to the said —
in respect of the said tenements, and of and from all fines, heriots, cert-
money, rights of timber, right of soil, and the mines and minerals or quarries
under the said hereditaments and premises hereby enfranchised, rights,
liberties, and privileges of hunting, hawking, fowling, and of chasing and
killing game, and rights of fishing, and all suits, fealty, burthens, ser-
vices, customs, and other manorial rights whatsoever, in consideration of
the grant by the said —, of an annual rent in fee of the amount of —l.
to be henceforth charged on and issuing out of the said hereditaments and
premises hereby enfranchised ; such annual rent to be valued and variable
according to the price of corn, in the manner provided for in the said acts
of parliament.

Testatum.

Now this Indenture witnesseth that the said —, in pursuance and
performance of the said recited agreement on the part of the said —, and
in consideration of an annual rent of —l. (variable as aforesaid,) here-
inafter granted by the said — : Do, with the consent of the said Copyhold
Commissioners, enfranchise, grant, and release unto the said —, his heirs
and assigns,

Parcels.

All and singular the said lands, hereditaments, and premises, comprised
in the hereinbefore recited grants, and which are particularized in the
Schedule hereunder written, and are delineated on the plan endorsed on the
— skin of these presents ;

General
words.

Together with all rights of common, and all and singular other rights,
royalties, members, and appurtenances to the said lands, hereditaments, and
premises hereby enfranchised, or any part or parts thereof, belonging or in
anywise appertaining ;

And all ways, paths, easements, and privileges whatsoever, to the said
lands, hereditaments, and premises belonging or appertaining ;

And also all the estate, right, title, interest, claim, and demand whatso-
ever of the said —, in, to, out of, or upon the said lands, hereditaments,
and premises, and every part thereof, with their appurtenances ;

Tenendum.

To have and to hold all and singular the said lands, hereditaments, and
premises hereby enfranchised, or intended so to be, with their appurte-

nances, unto the said —, his heirs and assigns for ever. **To the intent** that the copyhold tenure of the same lands, hereditaments, and premises, may be extinguished, and the said quit-rents of —*l.*, and all other rents, and all fines, heriots, rights of timber, rights of soil, and the mines and minerals, and quarries, under the said lands, hereditaments, and premises hereby enfranchised, rights, liberties, and privileges of hunting, hawking, fowling, and of chasing and killing game, rights of fishing, and all suits, fealty, burthens, services, customs, and other manorial rights incident thereto, or by custom, prescription, or otherwise howsoever, to be paid, rendered, or performed to the lords of the said manor of — for the time being, for or in respect of the same premises, or any of them, may be absolutely released, extinguished, and discharged ;

To the use of the said —, his heirs and assigns, for ever.

Usc.

Reserving nevertheless, and the said — (but not by way of warranty) pursuant to, or under and by virtue of the said recited acts, or some or one of them, **Doth** hereby grant unto the said —, their successors and assigns, one annual rent of —*l.*, to be henceforth charged upon and issuing out of all and singular the said lands, hereditaments, and premises hereinbefore enfranchised, such rent to be subject to the provisions of the said recited acts, and to be payable by two equal half-yearly payments, on the — day of — and the — day of —, in every year, without any deduction whatsoever, (except on account of property-tax) at —, where their audit is usually kept ; and the first payment thereof to be payable on the — day of — next, and subject to the provisions, and to be valued and variable according to the price of corn, in the manner mentioned and provided in and by the said acts of parliament, or one of them.

Reddendum
and grant by
the commis-
sioners.

And the said — doth hereby declare, that no wife of his who shall happen to survive him, shall be entitled to dower out of or in the said lands, hereditaments, and premises hereby enfranchised and granted, or intended so to be.

Dower de-
claration.

And the said —, for themselves and their successors, hereby covenant and agree with the said —, his heirs and assigns, that they the said —, and every person whomsoever having or rightfully claiming, or to claim any estate, right, title, or interest at law or in equity, in or to or out of the said lands, hereditaments, and premises, or any part thereof, through, under, or in trust for them (except the said —, or any person or persons claiming by, from, through, under, or in trust for them) will at any time or times hereafter at the request, and at the costs and charges of the said —, his heirs or assigns, make, do, execute and perfect every such act, deed, conveyance, or assurance in the law whatsoever, for the more effectually or satisfactorily enfranchising the said lands, hereditaments, and premises, or any part

Covenant for
further as-
surance.

thereof, with the appurtenances, according to the true intent and meaning of these present, as by the said —, his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required, and shall be tendered to be made, done, or executed.

Testatum of
the Commis-
sioners' con-
sent.

And this indenture lastly witnesseth, that the said Copyhold Commissioners, under the powers and authority in the said before-mentioned acts of parliament, or some or one of them given, ~~Do~~ hereby consent to the enfranchisement, grant, and release of the said lands, hereditaments and premises, in manner aforesaid.

In witness whereof the said — have caused their common chapter seal to be affixed hereto, and the said — hath set his hand and seal, and the said Copyhold Commissioners have set their hands and caused their seal to be affixed hereto, the day and year first before written.

The Schedule above referred to.

No. on Plan.	Description of premises.	Quantities.		

(III.)

This third Precedent is “A Deed of Enfranchisement of a piece of Copyhold Land by a Corporation, for the purpose of building a National School.”

Operative
part.

WE, the mayor, aldermen, and burgesses of the borough of —, as lords of the manor of —, in the county of the same town or borough, of which the piece of ground hereinafter described is held by copy of court roll, and which said piece of ground forms the copyhold part of certain freehold and copyhold ground this day conveyed by A. B. of —, in the county of —, as a site for the erection of a national school and schoolmaster's house, unto the several persons hereinafter named as trustees for a national school, and upon the trusts mentioned and set forth in the deed of conveyance; and under the authority of an act passed in the 5th year of the reign of her Majesty Queen Victoria, entitled, “An Act to afford further Facilities for the Conveyance and Endowment of Sites for Schools,” ~~Do~~ hereby freely and voluntarily, and without any valuable consideration, and for the purpose of enfranchising the same copyhold piece of ground from all manorial rents and services, grant, enfranchise, release, quit claim and convey unto M. A.,

B. A., A. L., H. B., T. C., J. B., J. P. B., E. H., and A. E., the trustees before referred to, and their heirs ;

All, &c.

Parcels.

~~Together with~~ all easements, appurtenances, and hereditaments, corporeal and incorporeal, belonging thereto or connected therewith ;

General words.

And all our estate, right, title and interest in or to the same ground and premises ;

To Hold the same unto and to the use of the said M. A., B. A., A. L., H. B., T. C., J. B., J. P. B., E. H., and A. E., their heirs and assigns, for the purposes of the said act, to the end and intent that the copyhold tenure of the said ground, hereditaments and premises may become and may be extinguished, and the same be for evermore held and enjoyed freely, clearly, and absolutely enfranchised, exonerated, acquitted and discharged by these presents, of and from all and all manner of yearly and other payments, rents, quit-rents, chief rents, fines, heriots, fealty, suit of court, and all usual or customary or copyhold payments, duties, services, or customs whatsoever, which, according to the custom of the said manor of —, the said ground, hereditaments, and premises, or any part thereof, are or is, or have or hath been, or ought otherwise to be subject or liable to be charged with, or which otherwise ought to be paid, done or performed for or in respect of the said ground, hereditaments, and premises, or any part thereof, as copyhold holden of or parcel of the said manor. ~~Provided~~ that nothing herein contained shall enfranchise, acquit, or discharge any ground, hereditaments, and premises, other than and except the piece of ground, hereditaments and premises hereinbefore described, of and from the copyhold tenure, or from any rents, payments, heriots, suits, customs, or service incidental thereto, or to be rendered and performed in respect thereof.

In Witness whereof the said mayor, aldermen, and burgesses have caused their common seal to be hereto affixed, and the other parties have hereunto set their hands and seals the — day of —, A.D. 1851.

Given under the common seal of
the said mayor, aldermen, and
burgesses, and signed by the
mayor of the said corporation
in the presence of —.

The draft-deed should be laid before the Education Committee of the Privy Council, and approved by their counsel. The mayor should, after executing it, acknowledge it on behalf of the Corporation before a Master Ex-

traordinary of the Court of Chancery, and the deed should then be enrolled in Chancery, although the land may be already in mortmain; but entry on the court-rolls of the manor is not necessary.

Statutes affecting copyholds,

25. Upon the point by what acts of parliament copyholds are affected when not expressly named in them, the following canon was enunciated by Sir Edward Coke:¹⁰⁸—When a statute alters the service, tenure, or interest of the land or other thing, in prejudice of the lord or tenants of the manor, there the general words of such an act do not extend to copyholds; but when an act is generally made for the good of the commonwealth, and no prejudice can accrue by reason of the alteration of any interest, service, tenure, or custom of the manor, there, usually copyholds are within the general purview of such acts.¹⁰⁹

Copyholds, then, are held to be within the following statutes:—

20 Hen. III., c. 1, (Stat. of Merton.)

West. 2, cc. 3 and 4, (13 Edw. I.)

4 Hen. VII., c. 24.

32 Hen. VIII., cc. 2, 9, 24, and 34.

27 Eliz. c. 4, (Fraudulent Conveyance Act.)

21 Jac. I., c. 16.

12 Car. II., c. 24, § 8, enabling the father to appoint a guardian to his children, provided the custom do not give the wardship to the lord; *contra*, if it do.

7 Anne, c. 19.

4 Geo. II., cc. 16, and 28, § 5.

9 Geo. II., c. 36.

11 Geo. II., c. 19, § 15.

17 Geo. III., c. 26, § 8.

6 Geo. IV., c. 74.

11 Geo. IV. & 1 Will. IV., c. 60, §§ 6 and 13.

(108) 3 Co. 8; Coke's Copyholder, § 63.

(109) See further as to this subject 1 Scriv. Cop. 81, and 2 Wat. Cop. c. x.

3 & 4 Will. IV., c. 74, §§ 50—54.

4 & 5 Vict., c. 38.

7 & 8 Vict., c. 76.

8 & 9 Vict., c. 106.

But Copyholds are held not to be within:—

20 Hen. III., c. 10, (Merton.)

52 Hen. III., c. 9, (Marlborough.)

6 Edw. I., c. 12, (Gloucester.)

11 Edw. I., (Acton Burnell, *de mercatoribus*.)

13 Edw. I., c. 1, West. 2, (*de donis*.)

13 Edw. I., c. 18.

17 Edw. II., c. 9.

16 Rich. II., c. 5.

11 Hen. VII., c. 20.

27 Hen. VIII., c. 10.

31 Hen. VIII., c. 1.

32 Hen. VIII., cc. 1, 28, 32, and 37.

34 & 35 Hen. VIII., c. 5.

13 Eliz., c. 4.

29 Eliz., c. 6.

31 Eliz., c. 7.

29 Jac. I., c. 16.

12 Car. II., c. 24, § 8.

29 Car. II., c. 3, § 12, but they are within §§ 4 and 7.

8 & 9 Will., III. c. 31.

7 Anne, c. 18.

4 Geo. II., c. 10.

14 Geo. II., c. 20, § 9.

47 Geo. III., c. 74.

59 Geo. III., c. 12, § 17.

1 & 2 Geo. IV., c. 114.

6 Geo. IV., c. 74.

1 Will. IV., c. 47.

CHAPTER VII.

CUSTOMARY FREEHOLDS AND ANCIENT DEMESNES.

- | | | |
|---------------------------|--|--------------------------------|
| 1. Customary freeholds. | | 4. The three sorts of tenants. |
| 2. Mr. Cruise's division. | | 5. How they become frank-fee. |
| 3. Ancient demesnes. | | |

Customary
freeholds.

1. CUSTOMARY FREEHOLDS,¹¹⁰ or, as they are also denominated, PRIVILEGED COPYHOLDS, were known in ancient times, as estates in privileged villenage or villein socage, and are estates held by custom, but not at the lord's will, in which they differ from copyholds: yet now the will of the lord in copyholds is, as we have seen, reduced to a mere fiction. These lands are of such an amphibious nature, that when they are compared with mere copyhold, they may be called freeholds, and when compared with absolute freeholds, they may be denominated copyholds. While the *freehold interest* or *estate* rests with the tenant, the *freehold tenure* is in the lord.¹¹¹ They are usually transferred, by surrender, into the hands of the lord and admittance of the new tenant. Their customs, incidents, and services, are similar to those already noticed as relating to copyholds properly so called.

Mr. Cruise's
division.

2. Mr. Cruise divides customary freeholds into two kinds:—(1) those of which the freehold is in the lord, more properly called *free* copyholds; and (2) those of which the freehold is in the tenant, strictly called *custo-*

(110) Coke calls them copyholds of frank tenure. Cop. § 32. They are most usual in ancient demesne.

(111) Mr. Serjeant Scriven dissents from this proposition of Coke, in his work on Copyholds, vol. ii., p. 572, *et seq.*

mary freeholds. The former pass by surrender and admittance, the latter by a conveyance which passes the freehold besides the admittance, (or as the custom is, in some manors, by surrender and admittance), which marks the change of tenancy.¹²²

3. The tenure of ancient demesne, or socage in ancient tenure, is confined to such lands as were held in socage of manors belonging to the Crown, in the times of the Confessor and the Conqueror. The question whether an estate be ancient demesne is to be decided by the production of Domesday-Book.

4. There are three sorts of tenants in ancient demesne : — The three sorts of tenants.

(1) Those who hold their lands freely by the royal grant.

(2) Those who hold of a manor which is ancient demesne, but not at the will of the lord, and whose estates pass by surrender, or deed of grant, or bargain and sale and admittance, and who are denominated customary freeholders.

(3) Those who hold of a manor, which is ancient demesne, by copy of court-roll, at the will of the lord, and who are denominated copyholders of base tenure.

5. Ancient demesne lands become frank-fee, when they escheat to the lord, or go to the Crown, or if the lord confirm to the tenant to hold freely, by the services before due, or if he enfeoff another of the tenancy, even with a saving of the ancient services ; also by a deed of confirmation to hold by certain services at common law.¹¹³ How they become frank-fee.

(112) 1 Cruise's Dig. tit. x., c. i., § 9.

(113) 2 Scriv. Cop. 579, to which the reader is referred for further information on this subject.

IN bringing this essay to a close we cannot but remark that amongst existing anomalisms, there is, perhaps, none more useless, more inconvenient, than the differing systems of our real-property law in relation to freeholds and copyholds. These serf-producing tenures (the direct effect of feudality), obtrude the remembrance of an unemancipated servility, without the slightest benefit to the country at large; and now, when labor is ennobled, idleness despised, and industry eulogised *usque ad æthera*, it is marvellous that a bold and comprehensive design,—for the cumbrous and involved attempts hitherto have been signal failures,—setting free this trammelled property, has not been promulged, so that one harmonious scheme of law comprehend all the land of the kingdom. Such a design would be more in accordance with our free institutions, and would, if ably developed, be characterized by a unity and clearness, which, unhappily, can hardly be said of modern innovations, even by their most impassioned admirers.

Yet it is to be earnestly prayed, that no man will dare to grapple with this important subject, unless he bring to the task a thorough knowledge, a just estimate of ancient principle, and a skilful adaptation of means to ends; for, rather than Copyhold-law be cast loose upon a sea of doubt and disorder, like the Bankruptcy and Equity practices, let us preserve it, with all its disadvantages, and shield the settled rights of our landowners against the busy and mischievous experiments of a crude and impotent reform. Next, indeed, to the grievance of a tyrannical government, is an uncertain and constantly-shifting law.

TRACTATE III.

IN TWO PARTS.

USES, TRUSTS, AND POWERS.

"The learning of uses and trusts is of the first importance to a correct knowledge of the Law of Title." THE TOUCHSTONE.

INTRODUCTORY.

IN our attempt to unfold the abstruse principles of Uses and Trusts, we shall distinguish these three historical epochs:—

I. The feudal Common Law period, which continued until about the reign of Richard II.

II. The prevalence of equitable Uses to the year 1535, and

III. The legalization of Uses and the system of Trusts since the Statute of Uses.

This last period we shall divide into two Chapters, the first of which shall be devoted to the elucidation of Uses as they at present obtain; and the last, to the development of Trusts as they now exist under the fostering care of the Court of Chancery.

CHAPTER I.

I. THE FEUDAL COMMON LAW PERIOD, WHICH CONTINUED
UNTIL ABOUT THE REIGN OF RICHARD II.

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| 1. Unity of the common law. | | possession or remainder. |
| 2. Estates could be only limited in | | |
| | 3. | Reasons for resorting to uses. |

Unity of the
common
law.

I. THE austere and unbending rules of our common law were, at a very early period of our history, found to be altogether unfit for those intricate arrangements of realty, which family settlements, commercial speculations, and the multiplied relationships amongst individuals in society required. The common law, in its pure but inflexible strictness, treated the actual possession of property and the abstract right to it, as one and inseparable. In order to have ascertained the owner of a landed estate, the question was, "Who is in possession of it?" The person that satisfied this enquiry was to all intents and for all purposes the owner of the property. Nor was it difficult to find him out, since the possession of his estate was conferred upon him by a formal and notorious ceremony technically called livery of seisin,¹ which was performed openly and in the presence of the people of the locality. Simple and uncompounded as this principle of law undoubtedly was, and convenient as the union of possession and proprietorship may appear, yet its simplicity was attended with hardship to the vassal, and resulted in the tyranny and oppression of the proud baron and the martial lord.

(1) There are two sorts of this livery. (1.) In deed; and (2.) Within view, or in law. 2 Sanders on Uses, p. 4.

2. The ceremony of delivering corporal possession of the land to the incoming owner was instituted in order that the *pares* or equals of the country might, upon any dispute about the freehold, be able to judge in whom the right of property existed. It followed, then, that no estate of freehold could be made to commence *in futuro* by the then assurance of feoffment and delivery of possession immediately given thereon. Estates could only be limited either in actual possession or in remainder to become vested in possession immediately upon the *natural* determination of a preceding estate. For on the creation of a freehold remainder, expectant on a preceding chattel-interest, *ex. gra.* a term for seven years, to M, remainder in fee to N, if livery of seisin in deed were made to M, the freehold would be immediately created, and vested in N during M's term; since N's remainder is an estate, which, in contemplation of law, commences at once, though its enjoyment, in our example, is postponed for seven years. An estate could not be limited to K for life, *provided* that if A should pay 1000*l.* in K's life time, the estate should then vest in A, because A's estate was to take effect on the *premature* destruction of K's estate, upon the payment of the money, instead of abiding its *natural* determination.

Estates could
be only
limited in
possession or
remainder.

The second limitation must have taken effect strictly as a remainder, although it might have been qualified; thus a limitation to B, until D perform a given act, and then to D; here B took only a life-estate, determinable in its original creation on D's performance of the act, upon the doing of which, B's estate expired naturally, that is, as was intended, and D's estate then took effect regularly as a remainder, without displacing or cutting short the prior estate of B. A condition might have been annexed to an estate at its creation, but then for breach of it only the grantor or his heirs could enter, by which entry all the remainders dependent upon such estate became defeated; so that the rules

relating to conditions were equally restrictive, since estates could not be raised, but only defeated by means of the condition. While the freehold in possession could not be limited on a contingency, because of the necessity of a continual tenant to the *præcipe*, estates in remainder might be so limited, although it was essential to create a preceding estate of freehold for their support, and they themselves must have vested immediately upon the determination of such preceding estate. A disposition of property by will did not exist, and was altogether interdicted.²

(2) The rule of tenure interdicted alike all destinations calculated to suspend the possession of the freehold, and all destinations calculated to shift that possession from one man to another without those solemn observances which the law had ordained for the transfer of the feud. In truth, the same general principles governed every disposition of the freehold: the necessity of a tenancy always full, and of a public ceremony to change the possession. If the law had sanctioned a gift to B from Christmas next, or to A for life, with a gift over, to take effect at the end of a year after A's death, in favour of B, the one or the other of those principles must have been violated; for the possession either must have been left open until Christmas, or until the year expired, or, if filled up, must at Christmas, or at the end of the year, have shifted unobserved to B. Again, if the law, upon a conveyance to A for life, with a gift over to his future children, had permitted such gift to take effect in favour of children coming into being at any period, whether before or after the determination of his life interest by forfeiture; or if, upon a conveyance to A for life, with a gift over to the future children of B, the law had permitted such gift to take effect in favour of children coming into being at any period, whether before or after the determination of A's life interest by death or forfeiture, the one or the other of the same principles would have been in danger of repeated violation. There might have been no child born before the failure of the life interest so failing in the parent's lifetime; in which case the possession would either have remained vacant, or, if filled up, have been liable to shift secretly to an afterborn child. The gift to such child, too, if for life or in tail only, might have spent itself by the death, or the death and failure of issue of the child, before the birth of another child, when the same state of things would have recurred. Besides, if the number of children had varied from time to time, the title to the possession would have fluctuated, opening or contracting as the objects increased or diminished, without any promulgation of the change. This last example affords a complete illustration of the position, that as well destinations suspending the possession, as destinations shifting the possession were inadmissible. 1 Hayes's Conv. pp. 19, 20.

3. Besides these and many more restrictions, it soon became evident that the iron rules of the common law were unfit for an age in anywise advanced beyond barbarism. An inflexible tenure and a difficult alienation were stumbling blocks to the encreasing transfer of property, the career of commerce, the untrammelled dominion of one's own rights, and the complicated wants of an enterprising and refined people. As speculation expanded, and the efforts of competitive industry multiplied, pressing emergencies and transitory difficulties sought accommodation and supply from landed property, and thence ingenuity was excited and experience sharpened to hit out a device which should set at nought the sternness of existing law and the hardship of rigid ceremony.

Reasons for
resorting to
uses.

A scheme was invented by the monastic jurists, which, by a nice adaptation, evaded, without overturning, the common law. Thus two methods of transferring realty began to co-exist in this country,—the ancient common law system, and the monkish invention, which is denominated Uses.

It is beyond the scope of the present enquiry to investigate the original cause of the introduction of Uses into this country, for, whether they owe their origin to mystery, or were suggested under the influence of fraud and fear, they were furnished forth from the vast resources and recondite learning of the civil law,³ and rejoiced in the happy fortune

(3) The word "Use" is in the civil law a generic term, under which the Roman lawyer classed two species of uses of a very distinct nature, namely the *ususfructus* and the *fidei commissum*. The first, which sounds so similarly to the English use, in reality no way resembled it: for its definition, as given by Domat,* (a right to use or enjoy a thing which is not our own, preserving it whole and entire without spoiling or diminishing), answers more nearly to the bailment of a personal chattel. But the exact similitude which the *fidei commissum* bears to the English use may be traced in the form which is preserved in the institutes of Justinian.† *Cum igitur aliquis scripserit, Lucius Titius*

* Lib. i. tit. 2. § 1.

† Lib. ii. tit. 23. § 2.

of securing for their nurse and protector the ample influence of the Court of Chancery, which enabled them, notwithstanding the robust opposition with which they were received⁴ by the partisans and advocates of the old, but

hæres esto; potest adjicere, Rogo te Luci Titi, ut cum primum poteris hæreditatem meam adire, eam Caio Scio reddas, restituas.

The person thus constituted heir was called *hæres fiduciarius*, and he to whom the testator directed the inheritance to be given was called *hæres fidei commissarius*. The *fidei commissum*, which is termed by Donat a direct substitution, to distinguish it from vulgar and pupillary substitutions, arose only from testamentary donations, and originated in the disabilities of the *deportati*, the *peregrini*, &c. to be legatees. The frequent misappropriation of the fiduciary property excited the indignation of Augustus; the consuls were commanded by him to interpose their authority, *ob insignem quorundam perfidiam*, to obviate the frauds and not to ease the conscience of the *hæres fiduciarius*. Until this direction of Augustus the *hæres fidei commissarius* had only a *jus precarium*, for which the remedy was by request. Hence the *fidei commissum* is justly defined *ultima voluntas quâ quid verbis precariis non civilibus per interpositam personam alicui relinquitur*.^{*} The emperor Justinian extended the rights of the *hæres fidei commissarius*; and in the absence of a written will, or the testimony of five witnesses, compelled the *hæres fiduciarius* to execute the trust, or to negative its existence by a solemn oath. Cornish on Uses, c. 1.

(4) Lord Bacon inveighs against them, in his opening remarks on the Statute of Uses, read at Gray's Inn, after the following fashion:—

“I have chosen to read upon the law of uses made 27 Hen. VIII, a law whereupon the inheritances of this realm are tossed at this day like a ship upon the sea, in such sort, that it is hard to say which bark will sink, and which will get to the haven, that is to say, what assurances will stand good, and what will not, whether is this any lack or default in their pilots, the grave and learned judges? But the tides and currents of received errors, and unwarranted and abusive experience have been so strong, as they were not able to keep a right course according to the law, so this statute is in great part as a law made in the parliament held 35 *Reginæ*; for in 37 *Reginæ*, by the notable judgment, upon solemn arguments of all the judges assembled in the exchequer chamber, in the famous case between *Dillon* and *Frayne*, concerning an assurance by *Chudley*, this law began to be reduced to a true and sound exposition, and the false and perverted exposition, which had continued for so many years, though never countenanced by any rule or authority of weight, but only entertained in a popular conceit, and in practice at adventure, grew to be controlled; since which time (as it cometh to pass always upon the first reforming of inveterate errors) many doubts, and perplexed questions have risen, which are not yet resolved, nor the law thereupon settled: the

^{*} Justinian's Inst. Lib. ii. tit. 23. § 1.

impracticable institutions, to make a stand, to acquire strength, to become stable, then, to be sanctioned, and eventually legalised by senatorial provision.

We are indebted to the monks for this clever system, which has endowed realty with a pliability that enables it to assume the most complex settlements; to anticipate a long series of accumulated requirements; and, to be transferred without trouble or publicity as well by act *inter vivos* as by will. Aided by the subtle flexibility of uses, a fee simple can be made to shift from one person to another by any circumstance subsequent to its creation; estates may also be limited to arise at a future period, independently of any other estate or interest; and powers⁵ and authorities limiting and changing estates may be created and entrusted to any persons, according to the convention of parties and the exigencies of any contemplated occasions.

Thus a novel contrivance, which was at first but a trivial innovation, treated with contempt and indifference, has become, in its progress, a gigantic system, which having superseded the doctrines and practice of feudal law, is in fact, the foundation of modern conveyancing.

consideration whereof moved me to take the occasion of performing this particular duty to the house, to see if I could by my travel, bring to a more general good of the commonwealth."

(5) Powers are so important a branch of Uses, that they will occupy the second part of this Tractate.

CHAPTER II.

II. THE PREVALENCE OF EQUITABLE USES, TO THE
YEAR 1535.

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| 1. A use defined. | | bargains and sales, and cove- |
| 2. Selected descriptions of a use. | | nants to stand seised. |
| 3. The parts of a use. | | 8. Difference between a use and a |
| 4. Requisites to raise uses. | | trust before the statute. |
| 5. Properties of uses. | | 9. Historical sketch of the statutes |
| 6. Division of uses. | | affecting uses to A.D. 1535. |
| 7. The equitable contracts called | 10. Inconveniences of uses. | |

HAVING shewn the necessity of a better method of transferring property than the Common Law afforded, and that the method adopted was the flexible machinery of Uses; we will now explain as well their nature and operation as their inception and progress *before* the Statute of Uses, which recognised and governed them.

A use de-
fined.

1. A use was in its nature equitable, and it may be defined to have been, a right in Chancery to the beneficial ownership of an estate, the possession of which was vested, through confidence, in another. The person enjoying the beneficial right was called the *cestui que use*, or he to whose use the land was conveyed, and the person in possession, the feoffee to uses. Thus A conveyed an estate to F, to his (A's) own use *or* to the use of C; F was the feoffee to uses, and A or C, as the case may be, the *cestui que use*.

Selected
descriptions
of a use.

2. The Text Books abound with descriptions of a Use; we select a few of the best.

And first Lord Bacon:—⁶

“The nature of a use is best discerned by considering what it is not, and then what it is, for it is the nature of all human science and knowledge to proceed most safely by negative and exclusive to what is affirmative and inclusive.

“First, use is no right, title or interest in law; it is neither *Jus in Re*; nor *Jus ad Rem*.

“A second negative fit to be understood is, that a use is no covin, nor is it a collusion, as the word is now used; for it is to be noted, that where a man doth remove the state and possession of land, or goods, out of himself unto another upon trust, it is either a special trust, or a general trust.

“So as now we are come by negatives to the affirmative, what a use is, agreeable to the definition in *Plowden*, p. 352, *Delamer’s case*, where it is said:

“Use is a trust reposed by any person in the terre-tenant, that he may suffer him to take the profits, and he that will perform his intent. But it is a shorter speech to say, that *Usus est dominium fiduciarium*; Use is an owner’s life in trust. So that *usus et status, sive possessio, potius differunt secundum rationem fori quam secundum naturam rei*, for that one of them is in court of law, the other in court of conscience; and for a trust which is the way to an use, it is exceeding well defined by a civilian of great understanding: *Fides est obligatio conscientia unius ad intentionem alterius*.”

Next, Lord C. B. Comyns in his well-known Digest (vol vii. p. 566, (A)) observes:—

“An use by the common law was a trust reposed in him who had the estate of the land, that *cestui que use* might take the profits.

“And was not issuing out of the land, but collateral to it,

(6) His lordship’s double reading on the Statute of Uses is useful, since besides its deep learning, it traces the history of the Statute-law in its efforts to convert equitable into legal estates.

and annexed in privity to the estate of the land, and the person of him who had the estate.

And therefore, no remedy by action or otherwise was given for it by the common law.

Lord C. B. Gilbert, in opening his Treatise on the Law of Uses and Trusts, describes it as follows :—

“An Use is where the legal estate of lands is in a certain person, and a trust is also reposed in him, and all persons claiming in privity under him, concerning those lands that some other person shall take the profits, and be so seized or possessed of that legal estate, to make and execute estates according to the direction of the person or persons for whose benefit the trust was created.

“By the rules of common law, he for whose use such person was so seized, had neither *jus in re*, nor *ad rem*; for if he came upon the land, he was a trespasser; and the reason was, because where lands were given to one, to the use of another, according to the construction of the common law, which is merely upon the words of a contract, the limitation of the use was adjudged repugnant and void, because by that law he cannot be otherwise than a plenary proprietor; and consequently he must have it to whom the property was first limited by express words; and by another rule of law, no possession could pass from one to another without solemn livery; and though the consideration was never so valuable, if that ceremony was omitted, nothing was transferred. But the Chancery, that examines the conscience with regard to men's actions, considers with what design agreements are made; and it is contrary to natural equity, that when any man has taken lands to keep for another, he should deceive him, and take the profits himself; or that a purchaser, when he has paid his money, should not have a sufficient conveyance in law executed, and a specific performance of the thing contracted for, and take the profits according to the agreement.”

In Sheppard's Touchstone⁷ it is thus set forth:—

“A (n), use is the (right in equity to have the) profit or benefit of lands or tenements; or, as others define it, the equity and honesty to hold the land *in conscientiâ boni viri*; or, as others define it more fully, it is a trust or confidence reposed in some other (not necessarily in some other), which is not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land; so that he (the *cestui que use*) for whom he (the owner of the seisin or estate) is trusted, shall take the profit of the land, and the terretenant (*i. e.* the trustee or owner of the seisin) shall dispose of it according to his direction: as for an example; if a feoffment be made to I S and his heirs, to the use, profit, or behoof of W S and his heirs; in this case, heretofore I S had the estate (seisin) and property of the land, but W S had and was to have the profits in honesty and equity. (I S was the feoffee to uses or trustee, W S was the *cestui que use*). So if one agree (d) with W S for a piece of land for 20*l.* and pay (paid) him the money, but hath (had) no assurance of the land, yet the equity and honesty to have this land is (was) in him that hath (had) contracted and paid his money for it: and this trust was called the use of the land, (and the purchaser was deemed the bargainee of the land); and hence, (or rather to exclude a resulting use), came the course in conveyances to set down in the *habendum*, to whose use; as *habendum* to A and his heirs, to the use of A and his heirs: and he for whom this trust is (created), and that ought to have the profit of the land by conveyance as aforesaid is called *cestui que use*. There is a (n) use also of goods and chattels, which is properly called a trust or confidence, for one may have such things to the use of another; (but the use or trust confers the equitable

(7) c. xxiv. vol. ii. p. 501, 7th edit. by Preston.

and not the legal title, and it is not every use of land which confers a legal title)."

It will be clearly collected, then, that the use was an equitable or beneficial interest, distinct from the legal property in the land.

Uses, in their inception, were fiduciary; unrecognised by the common law,⁸ and relying upon the Court of Chancery, for their support and efficacy.⁹ They operated on

(8) The reason why the *cestui que* use had no property whatever, by the common law, in the lands given to his use, was, because where lands were legally conveyed to one person to the use of another, the limitation of the use was deemed absolutely void: as it only derived its effect from the declaration of the feoffer; whereas no legal right to a freehold estate in lands could be transferred, without the ceremony of livery of seisin. Cruise's Digest, tit. xi. c. ii. § 3.

(9) In Cruise's Digest (vol. i. title xi. c. i. 4th edit.) the Jurisdiction of the Chancellors over Uses is thus detailed:—

xi. Upon the first introduction of uses into the English law, the person to whom a use was limited, who was called the *Cestui que* use, was exactly in the same situation with the *Heres Fidei commissarius*; and depended entirely on the good faith of the feoffees to uses, or the persons to whom the lands were conveyed. And it is natural to suppose, that while the rights of the *cestui que* use were so extremely precarious, and depended so entirely on the good faith of feoffee to uses, many breaches of trust were committed. Nor is it improbable but that even the ecclesiastics, who first introduced this species of property, became in some instances, the dupes of those to whom lands had been conveyed for their use. This induced the clerical Chancellors of those times to consider the limitation of a use as similar to a *fidei commissum*, and binding in conscience: they therefore assumed the jurisdiction which the Emperor Augustus had given to the Romish consuls, of compelling the execution of uses in the Court of Chancery.

xii. It however soon appeared that even this assumed jurisdiction was not sufficient to answer their purpose; for whenever a positive declaration of a use could not be proved, which must frequently have happened, when uses were declared in a secret manner, by words only, without writing, the Court of Chancery could not compel the feoffees to uses to execute them, there being no legal proof that they held the land to the use of any other persons.

xiii. To remedy this inconvenience John Waltham, Bishop of Salisbury, and Chancellor to King Richard II. took advantage of the privilege given him by the Statute of Westminster 2, 13. Edw. I. c. 34. of devising new writs: and invented a new writ of *subpœna*, returnable only into the Court of Chancery, which was used there for the same purpose as a citation in the courts of Civil and Canon Law, to compel the appearance of a defendant and to oblige him to

the conscience of the person possessed of the land sought to be affected by them.

3. The use consisted of three parts :—(1) that the feoffee The parts of a use. to uses should suffer the *cestui que* use to take the profits ; (2) that the feoffee to uses, upon the request of the *cestui que* use, or notice of his will, would convey the estate to the *cestui que* use or his heirs, or any other person by his direction ; and, (3) that if the feoffee to uses had been deprived, and so the *cestui que* use disturbed, the feoffee to uses would re-enter or bring an action to recontinue his possession.

4. The following were the requisites to be observed in Requisites to raise uses. raising uses :—

(1) That there should have been a person capable of standing seised to a use.

All persons capacitated to hold lands at the common law, could be seised to a use, and so could a married woman and an infant ; but the following persons could not, on account of the want of privity¹⁰ of estate, (which was one of the things absolutely necessary to the execu-

answer upon oath the allegations of the plaintiff, contrary to one of the first principles of the common law, that no man can be compelled to charge himself.

xviii. The abuses arising from the writ of *subpana* were in some degree restrained by the statute 15 Hen. VI. c. 4, which, after reciting—"That divers persons had been greatly vexed and grieved by writs of *subpana*, purchased for matters determinable by the common law of the land, to the great damage of such persons so vexed, and in subversion and impediment of the common law : " It was enacted that no writ of *subpana* should be granted, until surety was found to satisfy the party so grieved and vexed for his damages and expenses, if the matter could not be made good which was contained in the bill.

(10) Privity, in the understanding of the common law, is fourfold, as 1. Privies in estate : 2. Privies in blood : 3. Privies in representation : and 4. Privies in tenure : but in the doctrine of uses it is reduced to two general heads, privity of person and privity of estate.

tion of a use):— a lord of a villein or by escheat, or who entered for mortmain, or recovered by a *cessavit* (now abolished); tenant by the curtesy or in dower; a disseisor, abator or intruder. Besides a privity of estate, a confidence in the person¹¹ was also necessary, and, therefore, these persons could not be seised to a use; viz. a purchaser *bonâ fide* and without notice¹² of the uses; the king or queen, whether regnant or consort; aliens; persons attainted; occupants; tenants in tail,¹³ for life,¹⁴ or for years;¹⁵ and corporations.¹⁶

(11) Confidence in the person signified the trust reposed in the feoffees, that arose from the notice given to them by the use, and of the persons who were intended to be benefited, which was sometimes expressed and sometimes implied.

(12) But come now to the case of use, and there it is otherwise, as it is in 14 Hen. VIII. and 28 Hen. VIII. and divers books; which prove that if the feoffee sell the land for good consideration to one that hath notice, the purchaser shall stand seized to the ancient use; and the reason is because the chancery looketh farther than the common law, viz. to the corrupt conscience of him that will deal in the land, knowing it in equity to be another's; and therefore if there were *Radix Amaritudinis*, the consideration purgeth it not, but it is at the peril of him that giveth it; so that consideration or no consideration is an issue at the common law, but notice or no notice is an issue in the chancery, and so much for the preserving of uses.—Bacon on Uses.

The feoffee to uses must take it up under the trust limited and appointed; which may be done two ways.

i. By express words;

ii. By implication; which is twofold.

1. When one takes a feoffment, having notice of the several uses and trusts, there the party is supposed to take it under those uses and trusts; for the law will suppose a man's actions rather just than otherwise.

2. Where a man takes it upon a valuable consideration, there he is supposed to take it to his own use, for otherwise he would not have given an equivalent.

(13) For as to the estate or seisin of a tenant in tail, it was held, that no use could be limited upon it: 1st, because the tenure of itself created a valuable consideration. 2nd, because the statute *de donis* had appropriated and fixed the estate tail to the donee and the heirs of his body, so that neither he nor they could execute the use. 1 San. Uses and Trusts, pp. 28, 29.

(14) It is expressly stated in 2 Roll. Abr. p. 781, pl. 6, that if a lease be made for life, that shall be to the use of the lessee; and in Dyer (8 b) it is said, that "if the feoffees make a lease for life or an estate tail; in these cases if

(2) That there should have been a person capable of receiving or taking the use.

Every person capable of taking a transfer of an estate

they be argued closely, the law will prove that the lessee or donee cannot be seised to an use." The point indeed, now, is rendered of no importance as the stat. 27 Hen. VIII. certainly extends to a trust declared upon the seisin of a tenant for life.

(15) Mr. Sanders, 1 Uses and Trusts, p. 31, remarks:—

"That a termor or lessee for years could not at that time stand seised either to an *implied* or *express* use; or to explain myself more clearly, that the *subpana* was not issuable against him for the purpose of compelling him to perform the trust declared upon his lease; because it was supposed that the contract between the lessor and lessee, and the consideration upon which the latter took the lease, were incompatible with, and repugnant to, the nature of a use declared to any other person.

"The use or trust declared upon the estate of a lessee for years, was, in fact the *jus precarium*; the *cestui que* trust having nothing to depend upon but the honour and conscience of his trustee. It was not till after the statute of uses, that the Court of Chancery, acting upon more liberal principles, and being under the necessity of once more watching over the consciences of men, found an opportunity of supporting that as a *trust*, which the courts of common law rejected as a *use*, and of adopting a system in respect to the former, which is attended with all the benefits and without any of the inconveniences of the latter.

"On the other hand, the courts of equity have never considered any fiduciary interest as a *use* which was not considered as such before the statute 27 Hen. VIII. Such a construction would not have answered the purposes of equity. Thus, for instance, no use, as I have mentioned, could be declared upon a lease for years, and it was not within the statute 27 Hen. VIII.; yet the Court of Chancery conceived that the confidence reposed in the lessee was as much to be observed in equity as any other kind of use or trust. How was this confidence to be supported? Certainly not as a use, but as a trust which the Court of Chancery could fashion according to the more modern notions of equity. If it had been supported as a use, it must have been adopted with all its defects. But it is certain, that the trust declared upon a term of years, differs in most essential points from what a use formerly was."

(16) Bodies politic are not capable of a use or trust, because they are bodies framed at the will of the Crown, and are no further capable than the Crown wills them; and it is the royal will that they should purchase for the common benefit, and for the ends of their creation, and not that they should take any thing in trust for others; also being incorporate, the chancery had no process on the persons to compel them to discharge their trust.

A considerable ground against the capacity of a corporation, to stand seized to a use, appears to have been the want of confidence. As it is quaintly ex-

at common law, might have taken the same estate by way of use; but the limitation of a use to the parishioners of any particular place was void.

(3.) There should have been either a consideration to raise, or a declaration of, the use.

The courts of equity were desirous to mould uses after the model of the civil law; a gratuitous gift therefore could never be enforced, for in order to raise the use a consideration, either good or valuable, although trifling and inconsiderable, was essential,¹⁷ unless an express declaration of the use had been made, which was held tantamount to a consideration.

(4.) There should have been a sufficient substance or hereditament out of which the use might have arisen.

It was held that nothing whereof the use was inseparable from the possession, such as annuities, ways, commons, and authorities, *quæ ipso usu consumuntur*, or whereof the seisin could not be instantly given, could be granted to a use; but that all corporeal inheritances, as also incorporeal hereditaments *in esse*, as rents, advowsons in gross, and franchises, might be conveyed to uses.

Properties of
uses.

5. The properties of a use were these:—

(1.) They were descendible according to the rules of the common law relating to the inheritable estates of intestates; and the special customs of gavelkind, borough-english, and copyholds, determined the particular descent of uses. This is an illustration of the well-known maxim, *Æquitas sequitur legem*.

pressed in Plowden, p. 538, no confidence can be committed to a corporation as it is not a natural body which has reason and is capable of confidence, for these are the means to obtain the performance of it, and no corporation which consists of many persons, can be imprisoned, and their natural bodies shall not be imprisoned for their corporate body, which is another body.

(17) By the common law, however, a feoffment of land was good without any consideration.

(2.) They were devisable even before the Statute of Wills, 32 Hen. VIII. c. 1.

Lord C. B. Gilbert observes :—¹⁸

For the reason why lands were not originally devisable, was, because the ceremony of livery was required to the transmutation of the possession, which was not necessary to the disposal of an use; for livery was to give notice against whom the *præcipe* was to be brought, and the *præcipe* was only of an estate of freehold.

(3.) They were transferable, although at law they were mere *choses in action*. The statute 1 Rich. III. c. 1, empowered the *cestui que* use in possession, to alien the legal estate in the land, without the consent or concurrence of the feoffee to uses.

The reason of that statute was because *cestui que* use in possession often aliened the lands, and then the feoffees entered, which caused a great deal of vexation and chancery suits; and so the statute gave to *cestui que* use an immediate power of alienation, without the concurrence of the feoffees.

It might have been transferred by any species of deed or writing, and even to a person who was not a party to the deed raising the use, which was altogether contrary to the rule of the common law, and the reason given for it is, that a conveyance to a use was nothing but a publication of a trust. Technical words were not necessary, for a use might have been limited in fee simple without the word "heirs;" since if a sufficient consideration had been given, the Court of Chancery would have decreed the absolute property of the use to be well vested in the purchaser. The use might have commenced *in futuro*, and changed from one person to another, upon the happening of some future event, and a power of revocation might have been annexed to the limitation of a use.

(4.) A *cestui que* use in possession of the land was

(18) Uses, c. 1. § 2. div. 4.

deemed a tenant at will ¹⁹ only, for he had neither *jus in re*, *i. e.* an estate, nor *jus ad rem*, *i. e.* a demand, and therefore he could bring no action, having neither title nor legal estate in the property.

(5.) Neither widow could be endowed, nor husband have his curtesy of a use, because the *cestui que* use had no legal seisin of the land.

(6.) The *cestui que* use might have been impanelled on a jury. 2 Hen. V. c. 3.

(7.) The feoffee to uses, being complete owner of the land at law, performed the feudal duties, had power to sell, brought actions, his widow became entitled to dower, and his estate was subjected to wardship, relief, and forfeiture for treason or felony. In fact, he was treated at common law, as the absolute tenant of the fee.

(8.) A use being but a creature of equity, could not have been taken in execution for the debts of the *cestui que* use; for there was no process at common law but against legal estates.

(9.) A use, not being an object of tenure, was therefore exempt from the oppressive burdens of the feudal system. It was not forfeitable for treason or felony, because it was not held of any person. This was afterwards broken in upon by statute 12 Ric. II. c. 3.

(10.) A use was neither a chattel nor an hereditament, it was not then assets either for the executor or the heir at law.

Division of
uses.

6. There were two kinds of uses, viz.—

(1.) Official or active;

(2.) Permissive or passive.

The first kind imposed some duty on the legal owner or feoffee to uses, as, a conveyance to A with directions for him to sell the estate and distribute the proceeds amongst

(19) Some contend he was a mere tenant at sufferance.

B, C, and D; to enable A to perform this duty, he had the legal possession of the estate to be sold.

The second kind was resorted to, in order to avoid a harsh law, as that of mortmain or a feudal forfeiture, and was a mere invention to escape consequences by secresy, as a conveyance to A to the use of B; A simply held the possession, and B enjoyed the profits, of the estate.

Uses were also distributable into

- (1.) Express;
- (2.) Constructive; and
- (3.) Resulting.

An express use was created by the act of the parties, as a conveyance to A to the use of B; here it is clear that B took the beneficial use expressly.

A constructive use was equitably inferred from particular circumstances, as a conveyance to A upon condition that if B paid to him 100*l.*, the conveyance should become void; here upon the money being paid, a use was raised in favour of B constructively, for nothing is said about it directly.

A resulting use was analogous to the common law reversion, as a conveyance to A to the use of B for life, here upon B's death, the use resulted to the grantor.

7. After the creation of uses, a plan was adopted, by having recourse to an equitable contract, whereby a use was raised without actually transferring the land. Thus, an agreement to sell, for a valuable consideration in money or money's worth, was entered into between a vendor and vendee, upon which equity bound the conscience of the vendor, who still kept possession of the land, by treating him as holding the property to the vendee's use. This transaction was called a bargain and sale, which was often substituted for the actual transfer of the property; it had the effect of raising uses without changing in any way the legal possession, by simply converting the owner of the

The equitable contracts called bargain and sales, and covenants to stand seised.

land into a trustee, who held to the uses set forth in the agreement. While then the person of the legal owner was charged with the performance of the use, no legal estate in the land was conferred; and therefore a bargain and sale before the Statute of Uses was called an equitable contract.

It was frequently the case that uses were required to be raised in favor of the family of the legal owner, instead of a stranger. Then a bargain and sale was not the equitable contract made use of, but one called a covenant to stand seised. When, therefore, a legal owner of property was desirous of raising uses for the benefit of his wife upon marriage, or of his family afterwards, he covenanted in consideration of marriage or of natural love and affection to hold his land to certain uses expressed. This obviated the necessity of making a legal settlement, or a transfer to trustees to hold to the intended uses. Equity equally enforced this obligation upon the legal owner, so that the distinction between a bargain and sale, and a covenant to stand seised was and still is this, the former raises uses upon a money consideration in favor of strangers, the latter raises uses upon a consideration of marriage or natural affection in favor of relations; but they were both contracts enforceable in equity.

Besides this plan of raising uses by the non-disturbance of the legal possession; there existed the ordinary mode of transferring the possession to one person to hold upon certain uses for the benefit of another person, as a feoffment to A to the use of B: so that two modes of raising these equitable estates were practised, the equitable contracts which did not operate by transmuting the possession, and the conveyance by feoffment, or other common law assurance, which did.

Difference
between a
use and a
trust before
the statute.

8. There appears to have been a distinction between a use and a trust, even before the Statute of Uses. The use

was, as we have seen, an equitable interest general and permanent in the land, but an equitable interest, which was either special or transitory, was strictly a trust. Let us give an illustration of the difference; suppose a feoffment in fee, which transferred the possession to the feoffee, in whom a confidence was placed to pay to some other person and his heirs the rents and profits, and to make such transfers as he or they should direct. This confidence was clearly the use, commensurate to the legal estate; the feoffee's permanent fee being subject to the distribution of the profits, and the direction of the *cestui que* use and his heirs. A trust, however, did not divide the property into possession and use, for in such a case they were both transferred to the feoffee, in whom a confidence was placed that he would retain *both* for some given purpose; *ex gra.* a feoffment made by A to B in trust or to the intent to re-enfeoff A, or that B should convey to a third person: the trusts or intents were not uses, for the feoffee was not to pay over the profits merely; but to dispose of the profits *and also* the possession. This was not deemed a use, but a special trust lawful, in contradistinction to the special trust unlawful, which was created for fraudulent purposes, as to defraud creditors, to defeat the Statute of Mortmain, and the like.

If the two following statutes be compared, it will be manifest that Parliament did not consider the use and special trust to be the same: the 50 Edw. III. c. 6, subjected the *special trust* to an execution by a creditor of the *cestui que* trust; while the 19 Hen. VII. c. 15, extended, for the first time, the estate of the *cestui que* use.

It is, therefore, important clearly to distinguish these three interests:—(1) the use, properly so called, (which we have tried to explain); (2) the special trust lawful; and (3) the special trust unlawful.²⁰

(20) Bacon (on Uses) says:—

“ The special trust is either lawful or unlawful. The special trust unlawful

Trusts are supposed to have been known in the time of Henry the Third,²¹ but this is very doubtful; they were, however, frequent during the reign of Edward the Third. It is believed that the special trust gave the idea of the use, which is feasible, seeing that the progress from special or transitory purposes to general and permanent uses is natural, and by no means strained.

Historical
sketch of the
statutes affect-
ing uses to
A. D. 1535.

9. The Legislature made many efforts, before the passing of the Statute of Uses, to subject uses to the same rules as legal estates. A sketch of these attempts will, perhaps, be deemed interesting.

The earliest mention of the word "use" is in the Statute of Provisors, 7 Ric. II. c. 12:—

"And moreover it is assented, that if any alien have purchased, or from henceforth shall purchase, any benefice of holy church, dignity, or other thing, and in his proper person take possession of the same, or occupy it himself within the realm, whether it be *to his own proper use*, or *to the use of another*, without especial license of the King, he shall be comprised within the same statute."

In the 1 Ric. II. c. 9, uses seem to be referred to, though not mentioned; for it contains a provision, that a feoffment

is according to the case provided for by ancient statutes of the profits; as where it is to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the *præcipe*, or the Statute of *Mortmain*, or the lords of their wardships, or the like; and those are termed frauds, covins, or collusions.

"The special trust lawful is, as when I enfeoff some of my friends, because I am to go beyond the seas, or because I would free the land from some several statute, or bond which I am to enter into, or upon intent to be enfeoff'd, or intent to be vouched, and so to suffer a common recovery, or upon intent that the feoffees shall enfeoff over a stranger, and infinite the like intents and purposes, which fall out in men's dealings and occasions, and this we call confidence, and the books do call them intents: but where the trust is not special, nor transitory, but general and permanent, there is a use, and therefore these three are to be distinguished, and not confounded, covin, confidence and use."

(21) 1. Sand. on Uses and Trusts, p. 9.

of lands for maintenance was void, and an assize maintainable against *the pignor of the profits of land*.

To disappoint the wily avarice of the ecclesiastics in their evasion of the Statutes of Mortmain, the 15 Ric. II. c. 5, made uses subject to these statutes and forfeitable like the lands, by providing as follows:—

“ And moreover it is agreed and assented, that all they that be possessed by feoffment, or by other manner, *to the use of religious people* or other spiritual persons, of lands and tenements, fees, advowsons, or any other possessions whatsoever, to amortize them, and whereof the said religious and spiritual persons take the profits, that betwixt this and the feast of St. Michael next coming they shall cause them to be amortized by the licence of the King and of the lords, or else that they shall sell and alien them to some other use between this and the said Feast, upon pain to be forfeited to the King, and to the lords, according to the form of the statute of religious, as land purchased by religious people: and that from henceforth no such purchase be made, so that such religious or other spiritual persons take therefore the profits as afore is said upon pain aforesaid, and that the same statute extend and be observed of all lands, tenements, fees, advowsons, and other possessions, purchased or to be purchased, to the use of guilds or fraternities. And moreover it is assented, because mayors, bailiffs, and commons of cities, boroughs and other towns, which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion, that from henceforth they shall not purchase to them and to their commons, or office, upon pain contained in the said statute *De Religiosis*.²² And whereas others be possessed, or hereafter shall purchase to their use, and they thereof take the profits, it shall be done in like manner as is aforesaid of people of religion.”

By the 21 Ric. II. c. 3, forfeitures for treason were extended to lands, of which a person was seised as *cestui que* use.

The 4 Hen. IV. c. 7, and 11 Hen. VII. c. 3, confirmed and enlarged the 1 Ric. II. c. 9.

By 11 Hen. VII. c. 5, it appears—

“That tenants for lives or years, who were subject to actions of waste by the reversioner, upon their commission of it, had taken advantage of the doctrine of trusts, in order to escape punishment by conveying their estates to friends in trust for themselves, and afterwards committing waste upon the lands at their pleasure; they still continuing to occupy the premises, and to take the profits to their own use; for the reversioner being ignorant of the *legal* owner of the lands, did not know against whom to bring his action: It is therefore ordained and established, that they in the reversion in such case, may have and maintain a writ of waste against the said tenants for term of life, of another’s life, or for years, and so recover against them the place wasted, and their treble damages for the waste by them done, as they ought to have done for the waste committed by them before the said grant and lease of the estate.”

The 1 Ric. III. c. 1, encreased the power of the *cestui que* use. It recites—

“That forasmuch as by privy and unknown feoffments, great usurety, trouble, costs, and grievous vexation daily grow betwixt the King’s subjects, insomuch that no man that buyeth any lands, tenements, rents, services, or other hereditaments, nor women that have jointures, or dowers in any lands, tenements, or other hereditaments, nor men’s last wills to be performed, nor leases for term of life or years, nor annuities granted to any person or persons for their services for term of their lives, or otherwise, be in perfect surety, nor without great trouble and doubt of the same, because of such privie and unknown feoffments: for

the remedy whereof it is ordained, established and enacted, by the advice of the lords spiritual and temporal, and the commons in this present parliament assembled, and by authority of the same, that every estate, feoffment, gift, release, grant, leases, and confirmations of lands, tenements, rents, services, or hereditaments, made or had, or hereafter to be made or had by any person or persons being of full age, of whole mind, at large, and not in duress to any person or persons, and all recoveries and executions had or made, shall be good and effectual to him to whom it is so made, had or given, and to all others to his use against the seller, feoffor, donor or granter thereof, and against the sellers, feoffors, donors or granters, his or their heirs, claiming the same only as heir or heirs to the same sellers, feoffors, donors or granters and every of them, and against all others having or claiming any title or interest in the same, only to the use of the same seller, feoffor, donor or granter, sellers, feoffors, donors or granters, or his or their said heirs, at the time of the bargain, sale, covenant, gift or grant made; saving to every person or persons such right, title, action or interest, by reason of gift in tail thereof made, as they ought to have if this act had not been made."

Upon the operation and effect of this statute, Mr. Sanders²³ makes these observations:—

" This statute was evidently intended for the benefit of purchasers, by giving the *cestui que* use an alienable power over the possession, as well as the use. But the intention of the legislature was frustrated; for the statute did not deprive the feoffees of the power of alienation; and consequently if they aliened the land for a valuable consideration, and without notice, previously to any disposition made by *cestui que* use pursuant to the statute, such alienation disabled *cestui que* use from exercising the power which the statute meant to afford him. Besides this inconvenience,

(23) 1. Uses and Trusts, 21.

there was a still greater produced by the statute: for it often occasioned a kind of double-handed proceeding or fraud, both in the feoffees and *cestui que* use. The feoffees had a power over the possession by the common law, and the *cestui que* use by the statute. They often colluded, and by making secret and different feoffments, they purposely defeated each other's alienation, with a view to deceive purchasers."

At the time when Richard the Third usurped the crown of these realms, he was the feoffee to uses in very many estates, and as the King could not be seised to a use, he might have held these estates altogether, discharged of the uses, but he did not, for the act 1 Ric. III. c. 5, enacted, that where the King had been so enfeoffed jointly with other persons, the lands should vest in such other persons, as if he had not been named, and that where the King stood solely enfeoffed, the estate itself should vest in the *cestui que* use, in like manner as he had the use.

Then came the 1. Hen. VII. c. 1:—

"First, that where divers of the King's subjects having cause of action by formedon in the descender, or else in the remainder, by force of any tail for lands and tenements, be defrauded and delayed of their said actions, and oftentimes without remedy, because of feoffments made of the same lands and tenements, to persons unknown, to the intent that the demandant should not know against whom they shall take their actions; it is ordained, that the demandant in every such case have his action against the pernor or pernors of the lands, &c. demanded, whereof any person or persons had been enfeoffed to his or their use; and the same pernor or pernors named as tenant or tenants in the said action, have the same vouchers, and their lien thereupon and prayer, and all other advantages, as the same pernor or pernors should have had, if they were tenants indeed, or as their feoffees should have had, if the same action had been conceived against them," &c.

Among the inconveniences which attended the introduction of uses, it was found that lords lost the benefit of wardship; and, therefore, by a statute 4 Hen. VII. c. 17, the statute of Marlbridge was confirmed; and it was also provided, that the heir of *cestui que* use of lands held by knight-service, being within age, should be in ward; and being of full age, should pay relief. On the contrary, for the benefit of the heir of *cestui que* use, the same statute provided, that he should have an action against his guardian committing waste.

The 19 Hen. VII. c. 15, which is a curious act, is couched in the following language:—

“ De execucionibus contrà feoffatos faciendis.

“ Prayen the comons in this pressent parlement assembled, that where divers and many persones be defrauded of ther execucion as well of and uppon recognizaunce statutes of the staple, statutes merchauntes to them made, as of their dettes and damages recovered in accion of dette, trespass, or other accions, and in like wyse the lordes of whom eny landes and tenementes be holden in socage of ther releffes, and sometye of their heriottes, be reason that he so beyng bounde or condempned, and also he that of ryght ought to be very tenaunte to the lorde of whom suche landes and tenements be holde, causeth be fyne feoffament recovery or otherwyse divers persones to be seased of the seid landes, tenementes and other hereditamentes onely to his use, he tayking the profettes of the same, to the grete hurte, disceyte and defraude of all the Kinge's true liege people within this his realme, yf remedie be not therefore purveyd: In consideracion wherof be it ordayned, establisshed and enacted by the King our soveraigne lorde, by thassent of his lordes spirituall and temporall and the comens in this present parlement assembled, and by auctoritic of the same that from henseforthe it shalbe lafull to every shereff or other officer to whom eny writte or precepte is or shalbe directe, at sute of eny persone or persones

to have execucion of eny landes, tenementes or other hereditamentes ageyne eny persone or persones of, for and upon eny condempnacion, estatute merchaunt, estatute of the staple, or recognizaunce hereafter to be made or hadde, to doe, make and deliver execucion unto the partie in that behalfe suyng, of all suche landes and tenementes as eny other persone or persones be in any mannerwyse seased or hereafter shalbe seased, to the onely use of hym ageyn whom execucion is so seud, lyke as the seid shereff or other officer myght or ought to haue done yf the seid partie ageyne whom execucion hereafter shall so be sued, hade be sole seased of the seid landes and tenementes of suche estate as they be so seased of to his at tyme of the seid execucion seud.

“ And over that be it ordeyned by the seid auctoritie that the lordes of whom eny such landes or tenementes be holden in socage shall from henseforthe, after the deth of hym to whos use eny persone or persones as is aforesaid be seased, and no wille therof declared, have his relefe heriot and all other duetes, lyke as the seid lorde ought or myght have hadde if he hade died seased of the same.

“ Provyded allwey that every suche persone ageynst whom execucion is or shalbe hadde of landes and tenements soo beyng in possession of other persones to his use, may have all suche avauntages in the lawe, ageyne hym or them that so have execucion of the landes tenementes aforeseid as he myght or shulde have hadde if he hade be sole seased of the seid landes and tenementes at tyme of the said execucion sued.

“ And over that it be ordeyned by the seid auctoritie, that yf eny bondeman purches eny landes or tenements in fee symple, fee taile, or for terme of lyfe or terme of yeres, and causeth estate to be made to divers persones to his use, or takythe estate to hymselfe and to divers others joyntly with hym and to his use and behofe, that it shalbe lafull to the lorde of eny such bondeman to entre duryng the

same use into the seid landes and tenementes and every parcell therof so purchased by his bondeman in lyke maner and forme as he myght have doone yf the seid bondeman had onely be seased of the seid landes and tenementes in fee or otherwyse."

Lastly, is the 23 Hen. VIII. c. 10, reciting,

"That by reason of feoffinents made of trust of manors, &c. to the use of parish churches, chapels, churchwardens, guilds, fraternities, commonalties, companies or brotherhoods, erected or made of devotion, or *by common assent* of the people, *without any corporation*, and to the uses and intents to have obits perpetual, or any continual service of a priest for ever, &c., or to any other like uses and intents, there groweth to the king our sovereign lord, and to other lords and subjects of the realm, the same like losses and inconveniences, and is as much prejudicial to them, as doth and is in case where lands are aliened in mortmain: be it therefore enacted, That all and every such uses, intents and purposes, of what name, nature, or quality the same shall be called, &c. shall be utterly void; and if any person, in default of this statute, do bind their heirs, &c. that then every such pain, penalty, craft, colour, and every other thing, &c. shall be utterly void, and that this statute shall be always interpreted, &c. most beneficially to the destruction of such uses, &c. and of all other like uses and intents."

It will be gathered from these Acts of Parliament, that they tended to consider the *cestui que* use the real owner of the land; but it was reserved for the statute of uses to make him actually so.

10. "Though these uses," remarks Lord C. B. Gilbert, "had a very equitable beginning; yet like all new models and general schemes of ordering property, it in-

Incon-
veniences of
uses.

troduced a great many unforeseen inconveniences, and subverted in many instances, the institution and policy of the common law.

“First, estates passed by way of use, from one to another, by bare words only, without any solemn ceremony or permanent record of the transaction; whereby a third person that had right knew not against whom to bring his action.

“Secondly, Uses passing by will, the heirs were disinherited by the inadvertent words of dying persons.

“Thirdly, Lords lost their wardships, reliefs, marriages, and escheats: the trustees letting *cestui que* use continue the possession, whereby the real tenants that held the lands could not be discovered.

“Fourthly, The King lost the estates of aliens and criminals; for they made their friends trustees, who kept possession, and secretly gave them the profits so as the use was undiscovered.

“Fifthly, Purchasers were unsecure; for the alienation of *cestui que* use in the possession was at common law a disseisin, and 1 Rich. III. c. 1, gave him power to alien what he had; yet the feoffees may still enter to revest a remainder or contingent use, which were never published by any record or livery, whereby the purchaser could know of them.

“Sixthly, The use was not subject to the payment of debts.

“Seventhly, Many lost their rights by perjury in averment of secret uses.

“Eighthly, Uses might be allowed in mortmain.”

These grievances led the way to the Statute of Uses, to the discussion of which we will now proceed.

CHAPTER III.

III. THE LEGALIZATION OF USES, AND THE SYSTEM OF TRUSTS, SINCE THE STATUTE OF USES.

MODERN USES.

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| 1. Various names of the statute.
2. Its object.
3. Its chief enactments.
4. The requisites to execute uses—
<i>Scintilla Juris</i> .
5. Classification of uses.
6. Interests not within the statute. | 7. Purposes effected by conveyances to uses.
8. The operation of the statute upon modern conveyances.
9. Examples of legal and equitable estates with regard to the particular assurance used. |
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1. THE act²⁵ 27 Hen. VIII. c. 10, that transubstantiated the equitable use into the legal estate, by executing it in possession is known by several names. It is usually called The Statute of Uses; its title on the Parliament Roll is "An Act concerning Uses and Wills,"²⁶ and in pleading, it is described *Statutum de usibus in possessione transferendis*. Various names of the statute.

2. It has been generally said that the object aimed at by the passing of this statute, which entirely revolutionized the system of real-property transfer, was the total destruc- Its object.

(25) Lord Bacon's eulogy is as follows:—

This statute, as it is the statute which of all others hath the greatest power and operation over the heritages of the realm, so howsoever it hath been by the humour of the time perverted in exposition, yet in itself is most perfectly and exactly conceived and penned of any law in the book. 'Tis induced with the most declaring and persuading preamble. 'Tis consisting and standing upon the wisest and fittest ordinances, and qualified with the most foreseeing and circumspect savings and provisoes; and lastly, 'tis the best ponder'd in all the words and clauses of it of any statute that I find.

(26) About five years after the Statute of Uses, lands were made devisable by 32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5.

tion of the use, by effecting an amalgamation of the legal and equitable interests ; but, however this might be, it is certain that such an object has been signally defeated by the creation of the modern trust, which sprang from the judicial interpretation as declared by the Common Law Judges upon the meaning of this celebrated statute.²⁷

Its chief
enactments.

3. The statute, after reciting divers inconveniences, enacts :—

That where any person or persons stand, or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the *use, confidence* or *trust* of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise by any manner of means whatsoever it be, that in every such case, all and every such person and persons, and bodies politic, that have, or hereafter shall have any such use, confidence or trust in fee simple, fee-tail, for term of life, or for years, or otherwise ; or any use, confidence or trust, in remainder, or reverter, shall from

(27) The statute is generally considered as having only had the effect of enabling the conveyancer to shift the legal estate from one to another by mere words, in a way which ill accorded with the common law ; but is excellently adapted to the increased opulence of the country. It, however, also gave legal effect to modifications of property, which were repugnant to the common law ; but are admirably suited to the varying wants and wishes of mankind. It has, moreover, had the beneficial operation of introducing an unrivalled code of equitable jurisprudence, which every admirer of the law of real property must wish for ever to remain sacred and unconfounded with the strict rules of law. In comparing what the statute was intended to perform, with what it actually has performed, one can hardly doubt that almost any other legislative measure, which opposed the confirmed habits of the people in disposing of their property, would have led to the same results. This should operate as a lesson to the legislature, not vainly to oppose the current of general opinion, for, although diverted for a time, it will ultimately regain the old channel in spite of accumulated acts of parliament, which become a dead letter, and have a strong tendency to bring the most wholesome laws into disrepute. *Sir Edward Sugden's Introduction to Gilbert on Uses and Trusts.*

henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had, or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence, or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence, or trust that was in them. (§ 1.)

And it further enacts by the authority aforesaid, that where divers and many persons be, or hereafter shall happen to be jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust, of any of them that be so jointly seised, that in every such case those person or persons which have or hereafter shall have any such use, confidence or trust in any such lands, tenements, rents, reversions, remainders or hereditaments, shall from henceforth have, and be deemed and adjudged to have only to him, or them that have, or hereafter shall have any such use, confidence, or trust, such estate, possession, and seisin, of and in the same lands, tenements, rents, reversions, remainders, and other hereditaments in like nature, manner, form, condition and course, as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments; saving and reserving to all and singular persons, and bodies politic, their heirs, and successors, other than those person or persons which be seised, or hereafter shall be seised of any lands, tenements or here-

ditaments, to any use, confidence, or trust, all such right, title, entry, interest, possession, rents and action as they or any of them had or might have had before the making of such act. (§ 2.)

It also saves to all and singular those persons, and to their heirs, which be, or hereafter shall be seised to any use, all such former right, title entry, interest, possession, rents, customs, services, and actions as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they be, or hereafter shall be seised to any other use, as if the present act had never been had nor made; any thing contained in such act to the contrary notwithstanding. (§ 3.)

To give an illustration of the effect of the statute:—suppose a feoffment made to A to the use of B, the statute took the possession, which A had, as feoffee to uses, and gave it to B the *cestui que* use, so that A's estate was destroyed and B's use made a legal estate. A, having had the ancient common law estate, is said now to have a seisin, which is but a mere shadow. It has been called a conduit pipe to uses. This surely was a great effort to regain the simple unity of the feudal common law, by joining the dual interests (possession and use) invented by the Monks. How this was defeated by the addition of a second use, which equity denominated a trust, shall be presently explained. A modern use then is a legal estate acquired by virtue of the 27 Hen. VIII. c. 10, which empowers its owner to deal with the land at law as freely as he might have dealt with the use in equity.

The requisites
to execute
uses—*Scintilla Juris*.

4. There are six circumstances necessary to the execution of uses under the statute, viz.:—

(1.) A person seised to the use.

The statute expressly requires this:—"Where any person or persons stand or be seised or at any time hereafter

shall happen to be seised, of and in any honours, &c. to the use, confidence, or trust of any other person or persons." All persons, who were capable of being seised to uses before the statute may still be seised to a use. Aliens and corporations are excluded. If an alien be enfeoffed to uses, the statute executes the use until office found; but, upon office being found, the use is destroyed by relation. A corporation cannot stand seised to a use, because a *subpœna* from Chancery could not be issued against it to compel the performance of the trust, a reason which has now ceased to operate. The person must be seised of some species of freehold estate in possession, reversion or remainder.

(2.) *A cestui que use in esse.*

If the use be limited to a person not *in esse* or to an uncertain person, the statute does not operate. All persons, who are capable of taking land by a common law assurance may also have a use limited to them. A corporation may be a *cestui que use*.

It is now frequently the case that the same person is both seised to the use and is also the *cestui que use*: thus in a conveyance to A and his heirs to the use of A and his heirs, A has in this case the legal beneficial estate, and is said to be in at the common law, since the use is not a statute-use. In this case the estate to the *cestui que use* may be greater than the estate to the same person seised to the use, but where the seisin and the use are in different persons, then the use cannot be greater than the estate out of which it arises.

(3.) A use *in esse* in possession, reversion or remainder.

The use may either be created by an express declaration, or may result to the original owner of the estate, or may arise by implication of law.

(4.) Every species of realty, except copyholds, whether corporeal or incorporeal, in possession, reversion or re-

mainder, may be conveyed to uses, but it must be *in esse*.

(5.) There must be a seisin in the grantee or feoffee to uses at the time of the execution of the use.

The estate of the *cestui que* use is the estate of the grantee or feoffee, and a greater he cannot acquire. It is said that no seisin, not legally vested, can serve a use, and that, therefore, a use cannot be limited upon the transfer of contingent remainders, or a rent already granted to arise upon a contingency.

The seisin transferred by a feoffment, release or grant, for the purpose of serving uses, is an actual seisin, which must be as we have already said, commensurate to the use declared upon it; thus, a transfer to A for life to the use of B for life, in tail or in fee, the estate of B must determine upon the death of A, otherwise B's estate would be more extensive than A's seisin out of which it is raised, which cannot be.

Besides this actual seisin, there is a possibility of seisin called *scintilla juris*, which is supposed to exist in the grantee to uses, when all actual seisin is taken from him by the operation of the statute, upon a limitation of springing uses, and the creation of contingent ones.

To illustrate this, let us take a springing use: a grant to A and his heirs to the use of B and his heirs, until C perform an act, and then to the use of C and his heirs. Here the statute executes the use in B, which, being co-extensive with A's seisin, leaves no actual seisin in A. When, however, C performs the act, B's use ceases, and C's use springs up and he enjoys the fee-simple; upon which the question arises, out of what seisin is C's use served? It is said to be served out of A's original seisin, for upon the cesser of B's use, it is contended that the original seisin reverted to A for the purpose of serving C's use, and is a possibility of seisin or *scintilla juris*.

- If there must be a seisin somewhere to serve the future

uses when they arise, it must be either in the original grantee or feoffee to uses or the *cestui que use*, but the seisin of the *cestui que use* cannot serve any other uses, because that would be a use upon a use, which the common law repudiates, there only remains then the grantee or feoffee, who is capable of the requisite seisin, which cannot be a vested interest, but what is known as a *scintilla juris*.

Again, a feoffment to A in fee to the use of B for life, remainder to the use of his first son unborn in tail, with remainder to the use of C in fee. What seisin remains in A until the birth of a son of B? A has not an actual seisin during the suspense of the contingency, but there is a possibility of seisin reverting to him, for upon the birth of B's son, a seisin co-extensive with the use limited to such son, will vest in A for the purpose of serving it.

This doctrine of *scintilla juris* has been warmly contested. Lord Coke admitted it,²⁷ so did Mr. Booth,²⁸ Mr. Sanders,²⁹ and Mr. Burton.³⁰ But Lord Bacon,³¹ Mr. Fearn,³² Sir Edward Sugden,³³ and Mr. Preston,³⁴ opposed it; and Sir Edward Sugden contends that the doctrine never received a regular judicial decision.

(6.) The use may be raised by a conveyance operating either by transmutation or non-transmutation of possession. But contracts and agreements, which are merely referable to actual conveyances, do not raise uses under the statute.

(27) *Chudleigh's case*, 1 Co. p. 120 a. The doctrine of *scintilla juris* was started in *Brent's case*, which arose about six years after *Delamere's case*. Dyer, p. 340 a, 2 Leonard, p. 14, Dall, p. 112. The Chief Baron Periam said that Dyer's *scintilla juris* was like Sir Thomas More's Eutopia. *Chudleigh's case* is best reported in 1 And. p. 309.

(28) See his opinion at the end of Sheppard's Touchstone.

(29) 1 Uses and Trusts, c. 11. § 2, p. 107, *et seq.*

(30) 1 Comp. p. 59, 6th edit.

(31) On Uses, p. 47.

(32) Cont. Rem. p. 300.

(33) 1 Powers, c. 1. § 3, and note (10) to Gilb. Uses, p. 296.

(34) 1 Prest. Est. p. 170, and see 1 Hayes's Conv. p. 61.

Articles entered into before marriage to settle lands to certain uses, do not alone raise the uses, but an actual conveyance is necessary.³⁵

By the concurrence of these six circumstances, the statute transfers the actual seisin and possession from the feoffee or grantee to uses to the *cestui que use*, who then enjoys the legal estate, the confidence in the person of the feoffee to uses being changed into a direct right in the land vested in the *cestui que use*. The statute then was a law of restitution, to restore the ancient common law, which had been subverted by the two-fold system of uses.

The grantee or feoffee now ceasing to have any interest in the land, the estate neither escheats nor becomes forfeited, nor is subject to dower or courtesy on account of his momentary seisin. But although the statute transfers the legal estate to the use, it does not interfere with the title-deeds, and therefore it is held,³⁶ that the grantee or feoffee is entitled to the custody of them, although the *cestui que use* or legal owner since the statute has the equitable right to them. On this question Sir Edward Sugden³⁷ observes:—

“It is said that as the statute of uses only transfers the legal estate to the use, it does not interfere with the title-deeds, and therefore the feoffee or grantee is entitled to the custody of them. Certainly there is considerable authority for this statement, but there is hardly one case in which it was necessary to decide the point; and it has been questioned by Lord Hardwicke, who said, that though it was so clearly established, he knew not but, when it was considered, it might be called a spungy reason, as Lord Vaughan says, and it has since been doubted by Mr. Hargrave. The authorities make no distinction between

(35) *Edwards v. Freeman*, 2 P. W. 436; *Trevor v. Trevor*, 1 P. W. 622.

(36) 1 Sand. Uses, p. 118, and cases there cited.

(37) *Vendors and Purchasers*, c. ix. § 4, pl. 41 and 42.

feoffees or grantees and covenantees, or, in other words, between conveyances which operate by transmutation of possession, and those which do not.

“Now the statute not only provides that where one person stands seised to the use of another, the latter shall be deemed in the lawful seisin, estate and possession to all purposes in the like estate as the former had to the use, but proceeds to divest the estate, title and right, that was in such person, and to vest it in the *cestui que use*. This therefore is a legislative conveyance to the *cestui que use*, as powerful as the common law conveyance to the feoffee to uses; and as the latter conveyed to him the right to the deeds, although they were not granted, so the former ought to have as powerful an operation in transmitting them with the estate from him to the *cestui que use*. The opinion that in the case of a covenant to stand seised for the consideration of blood with strangers, the deed does not belong to the relation who takes the estate, but to the covenantees, and that he has no means to obtain the deed, shows how little principle was adhered to, for in that case the deeds were held to belong *not to the person who took the estate*, but to the persons who did not, and had not even any seisin vested in them; for in such cases the uses are served out of the covenantor's own seisin, and there is no *transfer* of the legal estate out of which the statute is to serve the uses.

“The cases have led to the practice of granting the deeds by the conveyance to a purchaser, and where uses are created, and he is not the releasee to uses, of making the grant to him, his heirs and assigns. This is a practice which the author (Sir E. Sugden) never adopted, and no evil is likely to arise from disregarding it, although, certainly, a case may arise in which the actual grant of the deeds may have some influence upon a purchaser's right to them.”

The estate of the *cestui que use* is subject, since the

statute, to dower, courtesy, escheat, and all³⁸ the incidents to which a legal estate is subjected.

Classification
of uses.

5. We will now attempt a classification of uses.³⁹ They may be thus arranged:—

I. Present or executed, distributable into:

(a) Those arising by act of parties, which are created either

(1.) By express declaration in a deed,

(2.) By presumed intention in a will,

(3.) By certain considerations.

(b) Those arising by act of law, which are either

(1.) Resulting,

(2.) Implied.

II. Future or executory,⁴⁰ distributable into:—

(a) Shifting or secondary,

(b) Springing,

(c) Contingent.

Let us briefly define, distinguish, and illustrate these several species of uses.

(38) Except the doctrine of remitter. *Doe d. Cooper v. Finch*, 1 Nev. & M. 172, n. (86)

(39) Uses may be shortly divided into vested, contingent and executory:—first, a vested use confers a legal estate, as when land is limited to the use of A for life; secondly, a contingent use confers a legal title answering to a contingent remainder at the common law, as when a limitation to the use of A for life is followed by a limitation to the use of his unborn children in tail; and thirdly, an executory use confers also a legal title, answering to an executory devise, as when a limitation to the use of A in fee is defeasible by a limitation to the use of B, to arise at a future period, or on a given event. This third class may be infinitely subdivided; but however widely those limitations which depart from the rules of tenure may appear to differ among themselves, it will be found upon examination, that the common point of difference, namely, non-conformity to the ancient law, is the essential characteristic of each. They all take effect by divesting, wholly or partially, the vested fee, being neither dependent on the estate, nor destructible, by the act of any preceding taker.—2 Hayes's Conv. p. 55, note (47).

(40) So called, because they are not executed into legal estates, by the statute, till they arise.

A present use is one, which has an immediate existence, and is at once operated upon by the statute, *i. e.* executed.

When arising by the act of the parties, present uses may be created (1) by clear and formal declaration, as a grant to B and his heirs to the use of A and his heirs, A takes the fee of the estate under the statute, by the express limitation plainly set forth in the grant. They may also arise (2) from a manifest intention in a will, for where an estate is devised to A for the benefit of B, the use is executed in the first or second devisee, as appears to come the nearer to the testator's desire. When the trustee is to be merely passive, and when there is no necessity for him to be clothed with the legal estate, it will then vest in the beneficial taker; as, in a devise to A, upon trust to permit B to receive the rents, issues and profits, the legal estate is vested in B, A having no duty whatever to perform.⁽⁴¹⁾ To this ruling, there is a great exception in the case of a married woman, for in a devise to A, upon trust to permit B (a married woman) to receive the rents and profits for her separate use, A has the legal, and B the equitable and beneficial estate; for unless this was the case, it is obvious that the testator's intention would not be effectuated, as otherwise the husband would be entitled to receive the rents and profits, subject to no control. But where there is a devise to A, in trust to pay over to B the rents and profits, A continues in the legal estate, in order to receive the rents and profits to hand over to B.⁽⁴²⁾ Present uses may also arise (3) by consi-

(41) *Doe dem. Leicester, v. Bigg*, 2 Taunt, 109.

(42) *Silvester v. Wilson*, 2 T. R. 444.

In Cornish on uses, p. 60, the following points on this subject are laid down:—

1. In a devise to trustees and their heirs upon trusts which are not clearly fixed for a definite period (as to demise freehold estates for any term they think proper),* they will take the fee; for then there is no ground for rejecting the word *heirs*, which carries the whole fee in point of law.†

* *Doe dem. Tomkins v. Willan*, 2 Bar. and Ald. 81.

† 1 Ves. 142. Collect. Jur. vol. i. 378.

deration, when the conveyances by bargain and sale, or covenant to stand seised are resorted to.

Present uses arising by act of law are either resulting or implied.

A resulting use arises where the legal seisin is transferred, and no use is expressly declared, nor any consideration nor evidence of intent, to direct the use; the use remains in the original grantor, for it cannot be supposed that the estate was intended to be given away: the statute immediately transfers the legal estate to such resulting use.

2. If there be a devise to trustees upon trust for sale, a constructive fee arises without the word *heirs*.* In a modern case, indeed, a chattel interest only was held to vest in the trustees, notwithstanding a limitation to the heirs and a trust for sale, were features of the will:† but this adjudication, which I do not presume to criticise, I cannot pretend to reconcile with the stream of authorities, unless, perhaps, by surmising with Mr. Sanders, that the *trust* for sale was considered in the nature of, and the same with, a *power* of sale.‡

3. Where an estate is given to A and his heirs upon trust to dispose of the rents in a particular manner during the life of B, and after the decease of B to stand seized of the lands to the uses therein mentioned; there, as the nature of the trust does not require that a legal estate shall reside in A for a longer term than the life of B, the Court will not consider the use executed in him for a longer period.§

4. When there is a devise to one for life, remainder to trustees and their heirs for preserving contingent remainders, and the estate of the trustee is not restrained to the use of the tenant for life, from the nature of the trust and the intention of the testator there seems reason to contend, that they should be considered as taking the legal estate for the period of his life only.||

5. Where the future beneficial interests are legal, and the problematical point is solely whether the trustees take a fee or a chattel interest, the Courts will lean in favour of the latter.¶ Thus, in a devise of lands to trustees to be transferred to A when he attains twenty-one, with limitation over in the event of his death before that age, they take a chattel interest during his minority:** for, as we shall hereafter see, a limitation ulterior to the fee is not generally, except by certain indirect modes, transferable; whence the interests of society, which call for a capacity for alienation, are favoured by the inclination towards a chattel interest overbalancing the argument for a determinable fee.

* *Ibid.* *Gibson v. Rogers*, Amb. 93.

† *Warter v. Warter*, 2 Brod. and Bing, 349; *Warter v. Hutchinson*, 1 Bar. and Cresw. 721.

‡ Sand. Uses, 258.

§ But. Co. Lit. 290 b.

|| *Ibid.*

¶ *Trodd v. Downes*, 2 Atk. 304. *Doe dem. White v. Simpson*, 5 East, 162.

** *Doe dem. Player v. Nicholls*, 1. Bar. and Cres. 336.

If the intent of the parties that the use should not result be plainly manifested, they will remain in the persons to whom the legal estate is limited. Parol evidence is admissible to show this intent, for the statute of frauds requiring declarations of uses to be in writing and signed by the party, extends, in cases of conveyances to uses, to third persons only, and not to the persons conveying or those to whom lands are conveyed to uses.⁴³

The doctrine of resulting uses extends only to those cases where an estate in fee-simple passes: it is not applicable where an estate-tail, an estate for life, or an estate for years is granted; for a consideration or declaration of the use prevents its resulting, and a tenure is a consideration, in consequence of the rent or service, which it includes; a use, therefore, cannot result on the conveyance of a particular estate, *i. e.* an estate less than fee-simple.

When any particular uses are declared, which do not exhaust the whole estate, so much of the use as the owner of the lands does not dispose of, remains in him.⁴⁴ The operation of this rule takes place in transfers operating by non-transmutation of possession; that part of the use undisposed of by the bargainor or covenantor is retained by him as his old estate, and is denominated a use by implication: *ex. gra.* if D covenant to stand seised to the use of his heirs male, begotten or to be begotten, D takes an estate for life by implication, for it is impossible for him to have any such heirs during his life, consequently the use undisposed of during his life remains in D.⁴⁵ Neither resulting uses nor uses by implication can ever arise to any person other than the original owner of the estate.

And where a use is expressly limited to the owner of the estate, he will not be allowed to take any resulting or implied use inconsistent with the use limited to him.

(43) 29 Car. II. c. 3, § 8; but see *Lamplugh v. Lamplugh*, 1 P. Wms. 112.

(44) 1 Inst. 23 a, 271 a.

(45) *Pybus v. Mitford*, 1 Vent. 327.

Future or executory uses are those limited to commence *in futuro*, but not by way of remainder.⁴⁶ It is a maxim that when a future limitation can enure as a remainder, it shall not enure as a future use. It may always enure as a remainder when it possesses these two qualities,—(1) dependancy on a prior particular estate, which it does not infringe, and (2) expectancy on its determination. A future use may be created without, and is always independent of, a preceding estate; it may be either vested, when it is to arise on an event certain; or, contingent, when such event is uncertain.

With regard to our division of future uses,

A shifting or secondary use is one that takes effect *in futuro*, in lieu of another use limited in the meantime, which it derogates or destroys. These uses are limited either expressly by deed, or are authorised to be created by some person named in the deed. Thus a limitation to the use of N and his heirs, with a proviso, that if M pay N 500*l.* the use to N and his heirs shall cease, and the estate go to M and his heirs: here the fee vests in N expressly subject to a shifting or secondary use to M in fee. If, however, the proviso had been that P may revoke the use to N and his heirs and limit it to M and his heirs, although the effect would be the same, yet this is a case of a person being seised in fee with a power of revocation and limitation of a new use in favour of another person. Shifting uses are very common in marriage settlements, for the first use is generally to the owner in fee till the marriage, and after the marriage to other uses, which, when they arise, annihilate the first use.

A shifting use cannot be limited on a shifting use; and it must be confined within proper limits, so as not to tend to a perpetuity,⁴⁷ but a shifting use may be created after an estate-tail, to take effect at any period however remote,

(46) See Tractate No. 1, p. 98, for the peculiar learning of remainders.

(47) See the rules as to perpetuity, Tractate No. 1, pp. 36, 37.

for there is not then any danger of a perpetuity, inasmuch as the tenant-in-tail can defeat such use.

A springing use is a future use, either vested or contingent, limited to arise without any preceding use, and which does not derogate any previous estate, other than that which results to the grantor, during the intermediate period, till the time comes when the use is to arise. It is therefore a first or original future use. Thus, a grant to D and his heirs to the use of B and his heirs after his marriage with M, B has a springing use.⁴⁸ So a bargain and sale to the use of Z ten years hence, Z has a springing use.⁴⁹ These uses must not violate the law against perpetuity.

(48) The case of *Parsons v. Mills* is a perfect instance of a springing use on a bargain and sale. There a man in a bargain and sale in fee of part of his estate, covenanted to give the bargainee the first offer of the residue, and that if he should attempt to alien the land to any other, then he would stand seised to the use of the bargainee in fee. He afterwards did attempt to alien to another, and it was held that the use was well raised to the bargainee; 2 Ro. Abr. 786, (K). Upon the same principle a man may covenant to stand seised to the use of another person after the covenantor's death; see 2 Wils. 79.

(49) Springing uses are either raised by a conveyance operating by transmutation of possession, or by a conveyance not having that operation. If raised by the former, viz. a covenant to stand seised, or bargain and sale, the estate remains in the covenantor or bargainor until the springing use arise, and as these conveyances have only an equitable effect until the statute and use meet, a springing use may be limited by them at once. Therefore a bargain and sale to the use of J D, after the death of J S, without issue, if he die without issue within twenty years, would be good (although it must be recollected that a springing use cannot be limited on a bargain and sale to a person not *in esse*, because no person can take under a bargain and sale who does not by himself, or agent, pay a consideration.) But where there is a conveyance which does operate by transmutation of possession, as a feoffment, fine, recovery, or lease and release, two objects must be attended to, viz. first, to convey the estate according to the rules of the common law; secondly, to raise the use out of the seisin created by the conveyance. Now the common law does not admit of a freehold being limited, to commence *in futuro*, therefore a feoffment to A and his heirs, to commence six months after, or a release (although founded on a lease for a year) after the death of the releasor, would be absolutely void: see *Roe v. Tranmer*, 2 Wils. 75; *Edmonds v. Boothe*, Yelv. 131: but a feoffment to A and his heirs *in presenti* is good, and out of the seisin of A and his heirs a springing use may be well limited: therefore, a feoffment to A and his heirs to the use of B and his heirs, at the death of J S, would be valid, and the use would result to the feoffor until the springing use

A contingent use properly takes effect as a remainder, and is in imitation of contingent remainders. Thus a use to the first unborn son of G, after a previous limitation to G for life, or for years determinable on his life, is an instance of a contingent use. This use must have a sufficient preceding estate to support it. It is subject to the laws which govern contingent remainders. But a good springing use is limited at once, independently of any preceding estate.

Interests not
within the
statute.

6. The following interests have been adjudged to be unaffected by the Statute of Uses:—

(1.) Uses limited of copyholds; since no person can be introduced into the estate without the lord's consent; for if uses were permitted, there would then be effected a transmuting of the possession by operation of law, which would be contrary to the peculiarity of this kind of tenure.

Yet shifting or springing uses may be limited by copyhold surrenders, so as to have the effect of divesting prior vested estates.

(2.) Leaseholds for years and chattel interests. It is said that the statute contemplated *freeholds* only, and therefore employed the word SEISED; now a tenant is *possessed* only of a leasehold for years; consequently in the case of an estate for years granted to M to the use of K, it is held that the statute does not execute the use, but M has the legal estate and is trustee for K, who enjoys the equitable use, or, as it is now more correctly denominated, the trust, and is the *cestui què* trust. Besides, chattel-interests were treated with such indifference, that equity would not have enforced a use, relating to them, before the statute. It is

took effect by the death of J. S. It should be observed, that in some cases (*e. g.* in 1 Ventr. 372) the judges have spoken of conveyances operating by transmutation of possession when they have alluded simply to a gift at common law, and not to a feoffment upon which *uses* were declared.—Gilbert on Uses by Sugden, 148, note (5) II.

to be carefully remarked, that the limitation of the freehold to a use for a term of years is not within this exception, for it is a use which the statute will execute.⁵⁰

(3.) Active and constructive uses. When the use involves a direction to sell the estate and then divide the proceeds of the sale or to pay debts, or to pay over the profits, or to convey to a child on attaining majority, or to re-convey on the repayment of a mortgage-loan, the statute was precluded from the very nature of the transaction from converting such a use into a legal right to the land, and equity, therefore, compels the trustee, who retains the legal estate notwithstanding the statute, to perform the duty confided in him.

And the trustee has the legal estate in the following cases:—a trust to permit a *feme covert* to receive the profits for, or to pay the same to, her separate use;⁵¹ and so of a trust to permit and suffer a party to receive and take the *net* rents and profits.⁵²

It is frequently an intricate question to answer, as to what quantity of legal estate vests in the trustee, for the cases are not consistent.⁵³ As to wills the 1 Vict. c. 26, § 30, enacts:—That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. And by § 31, it is enacted: That where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate,

(50) 2 Inst. p. 271; Gilbert on Uses, p. 182.

(51) *Pybus v. Smith*, 3 Bro. Ch. ca. 340.

(52) *Barker v. Greenwood*, 21 M. and W. p. 421.

(53) 1 Sand. Uses, p. 256, *et seq.*

or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

(4.) A second use or a use upon a use. The Common Law Judges determined⁵⁴ that the statute could only ope-

(54) Upon this decision Mr. Hayes remarks (1 Conv. c. III. p. 54.)

That the construction thus adopted mocked the reason and spirit of the statute, if indeed it did not militate against the plainest principles of interpretation, (which seemed to require that the word use should be understood according to the doctrines of Chancery, of which it was the creature), is apparent, when we consider, that, if, before the statute, upon a purchase of land by A, the conveyance had been made unto and to the use of B to the use of A; or unto B, to the use of C, to the use of A; neither B, in the first case, nor C, in the second, would, by force of the mere declaration of the use, have taken the beneficial interest, (*i. e.* the use), which, being manifestly designed for A, the purchaser, would have vested in him, while the legal estate would have resided in B. As there existed no third species of ownership, the legal estate and the beneficial right constituting the entire property, and as C, in the second case, was not destined either to possess the land, or to enjoy the usufruct, he, before the statute, would have taken nothing. So when, at this day, on a purchase by A, the legal estate is fixed in B, in trust for C, in trust for A, equity, in the absence of negative evidence, regards C as a cipher, and A as the true object of the trust, on the very same principles which, before the statute, would have induced equity to assign him the use; yet, strange as it may appear, a statute passed for clothing uses with the legal dominion, was made to confer that dominion, in the first example, on B, who had no use, and, in the second example, on C, who had not a shadow either of use or of estate. To point the argument—on what was the statute meant to operate?—uses. What were uses?—beneficial rights. Had B or C any beneficial right?—clearly not. Did the statute operate in their favour?—we have seen that it did. Why so?—because the law affirmed that the use was limited to them. But did equity permit them to enjoy beneficially?—no: equity affirmed that the usufruct belonged to A. Then it would seem to follow, that the law, in pursuit of something, which on examination proves to be really nothing, missed the substantial use at which the legislature aimed, and that law and equity drew different conclusions from the same premises.

This construction, however perverse it may be thought, was soon received as

rate upon one use, and where another use was superadded, it was a mere nullity, so that in a grant to A, to the use of B, to the use of C, the statute transferred A's possession to B, and turned B's use into the legal estate, and having done this, it went no farther, but stopped short and could not meddle with C's use, which was an interest unknown before the statute: upon this, equity interfered, and resuming her old dominion, treated C, the person having the second use, as the beneficiary, and compelled B, having the statute-use, to deal with the estate for C's benefit as a trustee, and then giving the technical term of "trust" to C's second use, deprived the use properly so called of its beneficial interest, which was its very essence before the statute, and revived the two-fold system of one person holding the legal estate in the land, while the equitable estate or usufructuary right therein was actually enjoyed by another. So that the old scheme of things was recurred to, whilst the terms were somewhat changed, for uses executed by the statute still retained their name, the *cestui que* use being called the legal owner; but, uses not so executed, *i. e.* secondary uses, or a use upon a use, took the appellation of trusts, while the holder of such uses is commonly denominated the *cestui que* trust or beneficiary.

Although for distinction's sake, and in practice, the first use, executed by the statute, is called a use, and the second use, not executed by the statute, a trust, yet this phraseology is altogether arbitrary, for either word may be applied indiscriminately and convertibly to either estate, since the particular interests enjoyed by the parties depend upon their position with regard to one another, and not upon the term employed in their denomination. The usual and strictly technical form is:—

a fixed principle; and the result was, that the use, whenever it affected to arise by superinduction upon a limitation capable *per se* of being executed into an estate by the statute, failed as a direct interest in the land at law, though it might still be supported as an equity against the person taking that estate.

To F to the use of C in trust for E; but,
 To F to the use of C to the use of E; or,
 To F in trust for C to the use of E; or,
 To F in trust for C in trust for E;

is immaterial, the effect in any of the above *formulae* being precisely the same, for C would be the legal owner and E the beneficial; so that a trust in name may be a use in effect, and *è converso*.

To the consideration of trusts, we will address ourselves in the following chapter.

(5.) Contingent uses, during the suspense of the contingency, cannot be executed by the statute, because the requisites, which we have already treated of,⁵⁵ do not concur.

(6.) It is said, that devises are not within the Statute of Uses, because it was passed before the Statute of Wills, (32 Hen. VIII. c. 1. A. D. 1540.) But this is of no practical importance, since the courts, in their decisions, are entirely guided by a testator's intention, and it has been always held,⁵⁶ that if A devise to B and his heirs, to the use of or in trust for C and his heirs, or in trust to permit C and his heirs to take the profits, it shows that the testator intended that C should have the legal estate in fee, and so the law decides. And if there be a devise to the use of A for life, with remainder over, although it cannot take effect by way of a use executed by the statute, because there is no seisin to serve the use, yet A will have the legal estate.⁵⁷ Indeed uses will be executed in a will, as if they were limited by deed, if such be the testator's intent.⁵⁸

(55) *Ante*, p. 366.

(56) 2 P. W. p. 134.

(57) 1 Sand. Uses, c. II. § 8 (5) p. 253.

(58) But here we must consider whether a devise to uses through the medium of a devisee, as a devise to A and his heirs, to the use of B and his heirs, will not take effect under the statute of uses. Upon this point a difference of opinion has been expressed: and, indeed, the subject is exhausted by the learning which has been displayed upon it. It must be admitted to be quite clear that an immediate devise to A for life, remainder to B in fee, would be good, although no seisin was raised to serve those estates; or, in other words, lands may be devised without the aid of the statute of uses, and

7. Conveyances to uses legalise many dispositions, which are altogether void at the common law, for uses may be

Purposes
effected by
conveyances
to uses.

it is not material that the limitations are termed *uses*: and of course powers may be created in like manner. They will be common-law authorities, and the appointee will be in, not by the statute of uses but by the devise. On the other hand it seems equally clear that where a seisin is raised by will to feed uses created by it, such uses will be executed into estates by the statute of uses.

In support of the contrary opinion, it is insisted that the statute of uses cannot refer to the statute of wills which was not then in contemplation. It is said to be difficult to conceive how uses created under the testamentary power given by the statute of wills can be within the statute of uses; and that it may be argued that a statute can *never* be considered as relating to anything which did not exist at the time of its passing. But this is well answered by Coke, who in *Vernon's* case, addressing himself to the precise objection, said "It is frequent in our books, that an act made of late time should be taken within the equity of an act made long time before," of which he gives many instances. In the principal case, that part of the statute of uses which relates to jointures, was holden to be within the equity of the statute of wills. It appears to have been thought in *Andrews's* case in 18 Eliz. that the statute of uses would operate on uses created by will; and in *Popham and Bampffield*, 34 Car. II. and *Burchett and Durdant*, 2 Will. & M. the same point was admitted both at the bar and by the court. In the case of *Hore and Dix*, 12 Car. II. it was resolved, that an use could not be raised without a deed. And as to the case of a devise of land to uses, by a will in writing, which is not a deed, it was said, that that went upon another reason, *scil. rather upon* the statute of 32 Hen. VIII. of wills, *than upon* the statute 27 Hen. VIII. of uses. This case has been treated as an authority, that the use is executed by the statute of wills, and not by the statute of uses; but, on the contrary, it appears to admit that the statutes may have a concurrent operation. It was in like manner admitted in *Broughton and Langley*, 2 Ann, that a devise of lands may be by express words to the use of another than the devisee, and that such devise will be executed by the statute of uses. In latter times, the same point has been repeatedly ruled, or treated as clear, and there is not a single case in which the point has been doubted. It must be considered therefore as settled, upon principle as well as authority, that the statute of uses *may* operate on uses created by will: and that where a seisin is created to serve the uses, the statute will in most cases transfer the possession to them. It is not denied that a devise unto *and to the use of* one will vest the legal estate in him, although ulterior uses are declared in favour of others; but this, perhaps, it may be said, is not by the operation of the statute of uses, but depends on an irresistible inference of the testator's intention, in analogy to the resolutions on limitations to uses in deeds.

It has been observed, that whether a devise to uses operates solely by the statute of wills, or by that statute jointly with the statute of uses, is, *except in*

suspended, revived, postponed and accelerated in a way altogether opposed to the rules of the ancient feudal law. Amongst the most important relaxations thus introduced are the following:—

a very few cases, a matter rather of speculation than of use : as it is now settled that an immediate devise to uses without a seisin to serve those uses is good ; and that where the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best with the intention of the testator. It is however indispensably necessary, that this point should be settled. Suppose an estate to be devised to A and his heirs, to the use of B and his heirs, and A die in the testator's life-time, is the devise void ? The solution of this question depends upon the previous one, viz. whether the devise do, or do not, operate under the statute of uses. If it do not, and the use should be considered as vested in B under the statute of wills, then the death of A would not defeat the devise. If it do operate under the statute of uses, then in fact the entire estate is given to A, and as the devise lapses by his death, there would be no seisin to serve the use limited to B, when it ought to arise by the death of the testator, and consequently it may be contended that the devise would be void. But although it seems clear that the statute in this case operates on uses created under the statute of wills, yet as every testator has a power either to raise uses by the joint operation of the statute of uses and the statute of wills, or by force of the statute of wills only, the courts would, it is apprehended, in favour of the intention, construe the devise as a disposition not effected by the statute of uses, but as giving the fee to B at once.

But even admitting that the devise is void at law, yet equity would, it should seem, compel the testator's heir at law to fulfil the intention, by conveying the estate to the same uses.

Nor is this the only case in which it is of importance that this point should be understood. Till we ascertain whether or not a power in a will is a common law authority, or a power deriving its effect from the statute of uses, we cannot discover in whom, by virtue of an appointment under such power, the legal estate is vested. To prevent these questions from arising, estates should be devised at once to the devisees intended to take beneficially, and not through the medium of a devisee to uses. Where the limitations in a will are numerous, a seisin to serve them is frequently created for the sake of brevity, as it saves the repetition of words of gift preceding every limitation ; but the same purpose will be effectually answered by devising the estate " to the uses after expressed," without naming any devisee to the uses, and then going on in the usual way with the limitations. If it should be thought necessary in any case, to raise a seisin to serve the uses, in order to attract the statute of uses, several devisees to the uses should be named, so that, in case of the death of any of them in the life-time of the testator, the estate might survive to the others, which it would certainly do if the estate was given to them, as it of course ought to be, as joint-tenants.—1 Sugden on Powers, pp. 171-175.

(1.) A person can convey to himself, which he could not at the common law, as it would have been absurd to give possession by livery of seisin to one's self. This is found to be convenient, especially in the following example:—

It frequently happens, that upon the death or removal of trustees, it becomes necessary to fill up their number pursuant to a power for that purpose, usually introduced into settlements of real property. In order to effect this, it is now the practice for the old trustees to make a conveyance, which operates by way of transmutation of possession (either by release or grant), to the new trustees and their heirs, to the use of the old and new trustees and their heirs. Without the assistance, therefore, of the Statute of Uses, it would have been necessary in the above case, that the old trustees should have first enfeoffed A, who would have re-enfeoffed the old and new trustees jointly; thereby making two conveyances necessary. Indeed, in the case of terms of years, and other personal property, two assignments are still required for the above purpose.⁵⁹

(2.) A conveyance could not have been made by a husband to his wife, but now by limiting a seisin to the grantee or releasee, the husband may declare the use to his wife, which the statute will execute.⁶⁰

(3.) A man could not make his own heir a purchaser, even of an estate-tail, for *filius est pars patris—hæres est pars antecessoris*; but now a man may limit the use so as to make his heirs special take, either by purchase or descent.

(4.) No person could take a present interest in the *habendum* of a deed, who was not named in the premises. But in a case, where A enfeoffed B, *habendum* to the said B and C, their heirs and assigns, to the use and behoof of the said B and C their heirs and assigns; it was resolved, that as C was not named in the premises, he could take no

(59) 1 Sand. Uses, c. 11. § 5, p. 135.

(60) Co. Litt. p. 112 a.

possession originally by the *habendum*; and that the livery, made according to the intent of the indenture, did not give any thing to C, because as to him it was void; but though the feoffment did not give any *seisin* to C, yet it did to B and his heir, which *seisin* was sufficient to serve the use declared to C. Therefore the use limited to B and C was good, and the statute executed it. But this limitation of the use in a bargain and sale to a person not named in the premises, after a previous disposition of it to the bargainee, would be void, for the reasons before mentioned.

(5.) So it is a rule of law, that if an estate be conveyed to two, the one being capable and the other incapable at the time of the grant, he who is capable shall take the whole; and that *joint tenants* cannot take at different periods. But since the introduction of uses, if A make a feoffment in fee, to the use of B and his wife that shall be: though the whole estate will vest in B at first, yet upon his marriage the wife shall take jointly with him. So if a disseisin be had to the use of two, and the one agrees to it at one time, and the other at another, they shall be *joint-tenants*.⁶¹

(6.) An estate of freehold cannot be granted at the common law, to commence *in futuro*, nor can a contingent remainder be supported, without an express particular estate of freehold; but by a conveyance under the Statute of Uses, a freehold can be created to commence *in futuro*, and future limitations will be supported, when no particular estate has been made, either as remainders, or springing uses.

(7.) An estate cannot at the common law be limited upon a fee-simple, *i. e.* a fee-simple cannot be made to cease as to one, and take effect by way of limitation upon a contingent event, in favour of another person; but such a limitation may take effect by way of shifting or springing

(61) 1 Sand. Uses, c. 2, § 5, p. 140.

use. A shifting or springing use, after a previous limitation of the fee, cannot be barred by the *cestui que* use by any kind of conveyance, but where it is limited upon an estate-tail, the tenant in tail may bar it.

(8.) Every remainder, at the common law, must be limited, so as to await the determination of the particular estate, before it can take effect in possession; but an abridgment of the particular estate, upon a certain condition, can be effected by a conveyance to uses, so as to accelerate the expectant estate into possession.

8. Let us say a few words upon the changes, which this statute effected in the modes of conveyance.

The operation
of the statute
upon modern
conveyances.

We have already shown,⁶² that bargains and sales, and covenants to stand seised, were real contracts passing equitable interests; the statute has made them legal conveyances.

A bargain and sale is now used, for the purpose of raising such a use as will attract the statute, which can be done without any beneficial interest being in the bargainor, and without any valuable consideration actually moving from the bargainee. Thus where A, the legal owner, bargains and sells to D for a nominal consideration, as a peppercorn rent, a use arises in D's favour, who then becomes entitled to the legal estate. This conveyance is in the nature of a declaration of uses, for the use is served out of the bargainor's seisin, and the deed serves to declare the use to the bargainee. As the use first passes, and then the possession is executed in the bargainee by the statute, it follows, that if another use be limited upon the bargainee's legal estate, the Common Law will take no notice of it, as it would be a use upon a use. The possession being transferred to the bargainee by the private delivery of the deed, the legislature passed the 27 Hen. VIII. c. 16, in order to restore in some measure a notoriety to the transfer of property, which statute provided,

(62) *Ante*, p. 351.

that every conveyance by bargain and sale of a freehold shall be enrolled in Chancery within six lunar months after the date thereof. The enrolment may be made either upon the day of the date, or upon the last day of the six lunar months, reckoning the day of the date exclusively. After enrolment, the deed is called a bargain and sale enrolled. It should be remarked, that limitations to persons, not *in esse*, cannot be introduced into this assurance.

A covenant to stand seised requires the same consideration, (blood or marriage), since the statute as before, and as long as the covenantor has the legal estate, though as trustee only, the use will arise, and the possession follow. There is no provision as to the enrolment of this assurance; for, marriage, which is the leading consideration to support it, is an open and solemn act, and therefore public and notorious. This deed has fallen into desuetude, as no use can arise thereon in favour of strangers. Yet still it is useful to know its properties, since an informal instrument, intended to have a different operation, may be construed, in favour of the intention, a covenant to stand seised, provided there exist a sufficient consideration to support such an assurance.

While a bargain and sale, or covenant to stand seised, passes the use, it is the statute which transfers the possession of the land, and therefore, these conveyances are said to operate by non-transmutation of possession.

Since the Statute of Enrolments only provided for the enrolment of bargains and sale of *freeholds*, an ingenious contrivance was resorted to, in order to avoid publicity in the transfer of property, so repulsive to an Englishman's notion of business. The scheme produced the compound conveyance of lease and release, and its operation was this. A contract, by way of deed, was first made by the grantor, to sell the estate to the grantee, upon a nominal consideration, for a year. By virtue of this contract, the grantee was entitled to the use for a year, which the statute imme-

diately turned into a legal estate in the land, so that the grantee became, without entry, tenant in possession to the grantor, thus a privity was easily set up between them, and such being the case, the grantor enlarged the grantee's interest into the estate agreed to be conveyed to him, which was effected by a second deed. The first deed was called a bargain and sale for a year, or a lease for a year, and the second a common-law release: and so, without entry, livery of seisin or enrolment, land was conveyed with all the secrecy and ease that could be desired. The 8 and 9 Vict. c. 109, did away with the necessity of this lease for a year, and provided, by § 2, that, after the 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant, as well as in livery; and that every deed which, by force of this enactment shall be effectual as a grant, shall be chargeable with the stamp duty with which the same deed would have been chargeable in case the same had been a release founded on a lease, or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease, or bargain and sale for a year, would have been chargeable. But the Stamp Act of last session—13 and 14 Vict. c. 97—provides in its 6th section as follows:—

“ And whereas under or by virtue of the said several acts herein-before recited, or some of them, certain stamp duties are now payable for or in respect of any bargain and sale, or lease for a year, for vesting the possession of lands or other hereditaments, and enabling the bargainee to take a release of the freehold or inheritance: And whereas by an act passed in the fourth year of the reign of her present Majesty,⁶³ intituled, ‘ *An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties,*’ it is provided, that every deed or instrument, taking effect under the said last

(63) 4 and 5 Vict. c. 21.

mentioned act in the manner therein mentioned, shall be chargeable with the same amount of stamp duty as any bargain and sale or lease for a year would have been chargeable with (*except progressive duty*) if executed to give effect to such deed or instrument, in addition to the stamp duties which such deed or instrument shall be chargeable with as a release or otherwise under any act or acts relating to stamp duties. And whereas by an act passed in the ninth year of the reign of her present Majesty,⁶⁴ intituled, ‘*An Act to amend the Law of Real Property*,’ it is enacted, that every deed which by force only of the said last-mentioned act shall be effectual as a grant, shall be chargeable with the stamp duty with which the same deed would have been chargeable in case the same had been a release founded on a lease or bargain and sale for a year, and also with the stamp duty (*exclusive of progressive duty*) with which such lease or bargain and sale for a year would have been chargeable: And whereas it is expedient to repeal the said stamp duties now payable for or in respect of any such bargain and sale or lease for a year as aforesaid, and also to repeal so much of the said two several acts last-mentioned as imposes upon any deed or instrument the said additional stamp duty as for a bargain and sale or lease for a year: Be it therefore enacted, That the said duties now payable for or in respect of any such bargain and sale or lease for a year as aforesaid, and also so much of the said two several last-mentioned acts as is herein-before recited, shall, so far as the same respectively relate to any deed or instrument which shall bear date after the said tenth day of October, one thousand eight hundred and fifty, be, and the same are hereby repealed.”

An appointment is a derivative and dependent assurance, by which uses are shifted and transferred. It is, in fact, a declaration of the use. This assurance is derived from, and conformable to, a power reserved or contained in the

(64) 8 and 9 Vict. c. 106.

original conveyance, by which the seisin to serve the uses is transferred. When it is intended to limit new uses, if it purport to create a seisin, these uses will be equitable interests. Thus a limitation, in pursuance of a power, to C to the use of E, vests the legal estate in C, and the equitable in E. An appointment, then, operates by non-transmutation of possession.

The ordinary Common-Law deeds of feoffment and grant may be used, with limitations to uses grafted upon them. The feoffment is rarely resorted to, on account of the livery of seisin, but the grant is, from the recent statute just quoted, becoming the universal mode of transfer, and in fact, superseding the release.

9. We have enumerated six conveyances under the Statutes of Uses, viz. Appointment to Uses, Bargain and Sale, and Covenant to stand seised, which do not transmute the possession; and, Feoffment, Grant, and Release, which do transmute the possession. The following examples point out the peculiar operation of these two classes of transfers, as to the vesting of the legal and equitable estates :—

An Appointment, Bargain and Sale, or Covenant to stand seised	{ to D and his heirs	To the use of T, and his heirs	To the use of, or in trust for S, and his heirs,
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vests the legal estate or use in D and the equitable estate in S, T taking nothing at all. But

A Feoffment, Grant, or Release	{ to D and his heirs	To the use of T, and his heirs	To the use of, or in trust for S, and his heirs,
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gives D but a seisin, and vests the use or legal estate in T, and the equitable in S.

Examples of legal and equitable estates with regard to the particular assurance used.

CHAPTER IV.

CHANCERY TRUSTS.

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| <ol style="list-style-type: none"> 1. Description of a modern trust. 2. Difference between a modern trust and an ancient use. 3. The three modes of creating a trust. 4. Classification of trusts. 5. Express trusts. 6. Executed and executory, or rather perfect and imperfect trusts. 7. Implied trusts, and their two classes. 8. Constructive trusts. 9. Resulting trusts. 10. How trusts may be declared. 11. Incidents of trusts. | <ol style="list-style-type: none"> 12. The notional transmutation of property. 13. Who may be a <i>cestui que</i> trust. 14. Who may be a trustee. 15. Duties of a trustee. 16. When purchasers are bound to see trusts performed. 17. The rules as to trustees becoming purchasers. 18. Trustees must act jointly.* 19. They can derive no benefit from the trust. 20. The relinquishment of a trust. 21. Diagrammatic conclusion. |
|---|---|

Description
of a modern
trust.

1. THE double system of property is preserved in our Laws of Realty, in despite of the Statute of Uses. What was the use before the statute has become the modern trust,⁶⁵—the creature of Equity, which is both its parent and its protector.⁶⁶ A trust then is a second use, not exe-

(65) Three things are said to be indispensable to constitute a valid trust; first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object. *Cruwys v. Colman*, 9. Ves. 323.

(66) The construction adopted by the courts of law upon the Statute of Uses obliged *cestui que* trust, entitled to a beneficial interest not executed by the statute, to apply for redress to the Court of Chancery; and the consequence of the statute has been, that the ancient use has been abolished with its inconveniences, and a secondary use has been introduced under the name of trust, modelled by the Court of Chancery after its own fashion, and being, as it is properly called, a creature of equity. The Chancery was aware of the mischiefs attendant upon uses before the statute: and, therefore, in exercising an exclusive control over these trusts, it has formed them so as to answer all the contingences of family settlements and domestic provisions. The observation, therefore, of Lord Hardwicke, that the Statute of Uses "*has had no other effect than to add, at most, three words to a conveyance,*" is not substantially cor-

cuted, because, according to the Common Law, not contemplated, by the statute. It is the equitable right to the beneficial enjoyment of property, which is in the legal possession of another.⁶⁷

rect; for by extinguishing the fiduciary existence of the use, the statute, in effect, has been the occasion of raising a system of equity which Lord Mansfield calls "noble, rational and uniform," in the place of a system at once unjust and inconvenient. "Trusts," says his Lordship, "are made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. VIII. meant to avoid."—*Sanders on Uses and Trusts*, vol. i. c. III. § 1.

(67) A trust, generally speaking, is a right on the part of the *cestui que* trust to receive the profits and to dispose of the lands in equity. But there may be special trusts for the accumulation of profits, the sale of estates, or the conversion of one trust fund into another, which may preclude all power of interference on the part of *cestui que* trust until such special trust be satisfied; and there is a distinction between trusts executed and trusts executory.

A trust does not include every equitable interest. An equity of redemption is said to be a title in equity, and not merely a trust. In *Pawlett v. the Attorney General*, (Hard. 465) Sir Matthew Hale observes, "there is a diversity betwixt a trust and a power of redemption; for a trust is created by the contract of the party, and he may direct it as he pleaseth; and he may provide for the execution of it; and, therefore, one that comes in in the *post* shall not be liable to it, without express mention made by the party. And the rules for executing a trust have often varied; and, therefore, they only are bound by it, who come in in *privity of estate*. A tenant in *dower* is bound by it, because she is in in the *per*; but not a tenant by the *curtesy*, who is in in the *post*. So all who come in in *privity of estate*, or with notice, or without a *consideration*. But a power of redemption is an equitable right inherent in the land, and binds all persons in the *post*, or otherwise; because it is an ancient right which the party is entitled to in equity.—*Sand. Uses and Trusts*, vol. i. c. III. § 2.

The object and intention of the statute 27 Hen. VIII. certainly was, to destroy that double property in land, which had been introduced into the English law by the invention of uses. If, therefore, the intention of the Legislature had been carried into full effect, no use could ever after have existed for more than an instant; for the moment a use was created, the statute would have transferred the legal seisin and possession to such use. But the strict construction which the Judges put on that statute defeated, in a great measure, its effect; as they determined that there were some uses to which the statute did not transfer the possession: so that uses were not entirely abolished, but still continued separate and distinct from the legal estate, and were taken notice of, and supported by, the Court of Chancery under the name of trusts.

A trust is, therefore, a use not executed by the statute 27 Hen. VIII.; for originally the words *use* and *trust* were perfectly synonymous, and are both mentioned in the statute. But as the provisions of the statute were not

Difference between a modern trust and an ancient use.

2. It is common to meet with the assertion, that trusts are now, what uses were before the statute. Now, although they are both equitable, and therefore beneficial estates, distinct from the legal ownership in realty, yet, equity construes them differently, and while there is no variance between the principles relating to them, there is a wide distinction in the exercise of them;⁶⁸ for modern trusts extend not only to trusts declared upon a legal estate in fee, but to those declared upon the estates of tenants in tail, for life, and years, and also to special trusts.⁶⁹ Equity holds that the trust attaches to the land itself, and converts all persons acquiring the legal estate, with notice of the trust, into trustees to perform such trusts.

The three modes of creating a trust.

3. There are three modes of creating a trust:—

(1) By limiting a use upon a use, this last use being treated in equity as a trust; all which we have explained.⁷⁰

(2) By limitations to trustees to pay over rents; thus if A make a grant in fee, to his own use, during his life, and after his decease, his grantees to take the profits and pay them over to A B; the grantees would have the legal estate, that they may take the profits, and A B would be the *cestui que* trust.⁷¹

deemed co-extensive with the various modes of creating uses, such uses as were not provided for by the statute were left to their former jurisdiction.

A trust estate may be described to be a right in equity to take the rents and profits of lands, whereof the legal estate is vested in some other person; to compel the person thus seised of the legal estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits, who is called the *cestui que* trust, shall direct, and to defend the title to the land. In the mean time the *cestui que* trust, when in possession, is considered in a court of law as a tenant at will to the trustee.—Cruise's Digest, title xii. Trust, c. 1, §§ 1, 2, and 3.

(68) 1 Wm. Black, 180. (69) *Vide ante*, p. 353. (70) *Vide ante*, 380.

(71) *Vide ante*, p. 373, as to the distinction in a devise between a trust to pay and one to permit. It is now settled, that where an estate is devised to one, for the benefit of another, the courts will execute the use in the first or second devisee, as appears best to suit the intention of the testator, from which it follows, that whenever an estate is devised to trustees, with a requisition to

Where lands are devised to trustees, charged with the payment of debts, upon trust for a third person, the trustees will not take the legal estate.⁷² And a trust estate, limited after payment of debts, vests immediately.

(3) By limiting terms for years upon trust; as the grant of a term to A, in trust for, or to the use of, B, A has the legal estate, and B the equitable, for the statute does not include chattels real.

4. Trusts are usually divided⁷³ into two kinds:—(1) *Express*, and (2) *Implied*, which latter comprehend *constructive* and *resulting* trusts. Classification of trusts.

5. An express trust is created by the positive act of the parties, evidenced in a deed, will or writing, manifesting the intent to raise a trust. Express trusts.

do any act, to which the seisin and possession of the legal estate are necessary, although they be directed to permit the rents and profits to be received by another person, still that person will only be entitled to a trust estate; for otherwise the trustees would not be able to execute the trust.—*Fearne's Opin.* 422.

(72) *Kenrick v. Beaucherk*, 2 Bos. and Pull. 175.

(73) "All trusts," said Lord Nottingham (*Cook v. Fountain*, 2 Swan. 585) "are either, first, *express* trusts, which are raised and created by act of the parties; or *implied* trusts, which are raised or created by act or construction of law. Again: express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the Court, upon consideration of all circumstances, presumes there was a declaration either by word or writing, though the plain and direct proof thereof be not extant. In the case in question, there is no pretence of any proof that there was a trust declared, either by word or in writing; so the trust, if there be any, must either be implied by the law, or presumed by the Court. There is one good, general, and infallible rule, that goes to both these kinds of trusts. It is such a general rule as never deceives; a general rule to which there is no exception, and that is this, the law never implies, the court never presumes, a trust but in case of absolute necessity. The reason of this rule is sacred; for, if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate. And so at last every case in court will become *casus pro amico*."

Executed and
executory, or
rather perfect
and imperfect
trusts.

6. In marriage articles and wills, there is an important and now well-established⁷⁴ distinction between trusts executed and trusts executory.

When an estate is conveyed to the use of A and his heirs, with a simple declaration of the trust for B and his heirs, the trust is completely expressed, and is said to be executed, because no further act is necessary to be done by the trustee to raise and give effect to it; and, because, there is no ground for the interference of a court of equity, to affix a meaning to the words declaratory of the trust, which they do not legally import.

When the devise, agreement or articles are directory or incomplete, describing the intended limitation of some future conveyance or settlement, directed to be made for effectuating it, there the trust is executory. These are rather considered as instructions for settlements, than as instruments complete in themselves. The ground of construction, as to words of limitation, differs in wills and marriage articles: in wills, it is the intention of the testator manifestly appearing; in marriage articles, it is the nature of the transaction, and the presumed object of the parties.⁷⁵

(74) *Vide* Lord Hardwick's dictum in *Bagshaw v. Spencer*, 1 Ves. Jun. 142; 2 Atk. 246, 583, 1 Coll. Jurid. 413; Mr. Fearne's contraversion of it, Cont. Rem. 178 *et seq.* and Mr. Maddock's Vindication, 1 Prin. of Equity, 706—720. Also, contrast the remarks of Lord Mansfield and Mr. Justice Yates in *Perrin v. Blake*, 1 Coll. Jurid. 295 and 316.

(75) There is a distinction recognised in Equity between executory trusts, created under marriage articles, and those created under wills, in relation to the interpretation of them, and the mode of carrying them into execution. In cases of marriage articles, Courts of Equity will, from the nature of the instrument, presume it to be intended for the protection and support to the interests of the issue of the marriage, and will, therefore, direct the articles to be executed in strict settlement, unless the contrary purpose clearly appear. For otherwise it would be in the power of the father to defeat the purpose of protecting and supporting such interests, and to appropriate the estate to himself. But, in executory trusts under wills, all the parties take from the mere bounty of the testator; and there is no presumption that the testator means one quantity of interest rather than another, an estate for life in the parent, rather than an estate tail; for he has a right arbitrarily to give what estate he thinks fit to the parent or to the issue. If, therefore, the words of marriage articles limit an

Since all trusts are executory, so far as the trustee is bound to dispose of the estate within the meaning of the trust, it has become the modern practice for conveyancers to denominate these trusts, as perfect and imperfect, instead of executed and executory.⁷⁶

estate for life to the father, with remainder to the heirs of his body, Courts of Equity will decree a strict settlement, in conformity to the presumed intention of the parties. But if the like words occur in executory trusts created by a will, there is no ground for Courts of Equity to decree the execution of them in strict settlement, unless other words occur explanatory of the intent. The subject being a mere bounty, the intended extent of the bounty can be known only from the words in which it is conferred. If it is clearly to be ascertained from any thing in the will, that the testator did not mean to use the expressions which he has employed in a technical sense, Courts of Equity, in decreeing such a settlement as he has directed, will depart from his words in order to execute his intention. But they will follow his words, unless he has himself shown that he did not mean to use them in their proper sense; and they have never said, that, merely because the direction was for an entail, they could execute that by decreeing a strict settlement.—Story's Equity Princip. vol. ii. c. xxv.

(76) Executory trusts are not very intelligibly distinguishable *inter se* between executory trusts, to be executed in conformity to the effect of the trust as it stood expressed, applying to its language the test of legal rules; and executory trusts, to be executed upon the equitable notion, already stated, of an intention merely hinted, and left to be interpreted and completed by professional learning and skill. Thus, if A. conveyed to B., upon trust to settle the land on C. for life, and after his death, on the heirs of his body, it was considered, that, as C. would, according to the legal construction of the limitations, take, by force of a well known rule of tenure, an estate tail, the trust, though styled executory, was to be executed by the limitation of an estate tail to C., which of course rendered the direction idle, by, in effect, reducing the trust to a simple trust for C. in tail; and surely, to denominate a trust to be *so* dealt with "executory," as opposed to a trust "executed," is to introduce a distinction without a difference, and utterly to confuse all our ideas. On the other hand, if A. conveyed to B., upon trust to settle the land on C. for life, and after his death, on the heirs of his body, with some *additional* ingredient, as a direction that C. should not have power to bar the entail, (but which ingredient, if the limitations were legal, clearly, would not prevent his taking an estate-tail), shewing that C. was meant to be merely tenant for life (an intention more decisively indicated, it may be thought, by the express limitation for life), the trust was not only styled executory, but was executed by limiting an estate for life only to A., with remainders to his issue, as purchasers, in a course of strict settlement. To enquire whether it was reasonable and consistent to hold, in the former case, that the direction to settle went for nothing, because the express limitations, tried by legal rules, imported an estate tail in

7. An implied trust arises generally from an equitable construction put upon the acts, conduct, or situation of parties.

Implied trusts have been distributed into two classes : (1) those depending upon the presumed intention of the parties; as where property is delivered by one to another to be handed over to a third person, the receiver holds it upon an implied trust in favour of such third person ; (2) those not depending upon such intention, but arising by operation of law, in cases of fraud, or notice of an adverse equity.

Constructive
Trusts.

8. A constructive trust is one, which arises from equitable operation ; thus, when an estate is subject to a trust or equitable interest, and a person purchases it for value, with either actual or constructive notice thereof, the estate will still be subject to the trust, or equitable interest in the hands of such a purchaser. To this general rule, however, there is an exception in the case of a *Disseisor*, *Abator*, or *Intruder*, who will not be seised to an Use, although he have notice of it, for he is not *in* in privity of the Estate, to which the Use is annexed, but in the *post*. And notice of an unenrolled bargain and sale, or of an unregistered deed, will bind a purchaser ; but notice of a fraud will not convert the person receiving it into a trustee. So a person

C., and, in the latter case, that the direction to settle was all-powerful, because an additional ingredient was thrown in, *which, tested by the same rules, would be nugatory*, is beside our present purpose, which aims at stating and illustrating general principles, without examining into the soundness of their particular application. It is enough to have marked the distinction between those trusts of which the effect is to be sought only in their very terms, and those trusts of which the effect is referred to a future instrument to be prepared in the *officina* of Chancery, for developing and establishing the half-indicated purpose ;—a distinction apparently founded in reason, and perfectly suitable to the genius and functions of equity. There is another description of trusts, to which, in the poverty of our legal vocabulary, the terms “executed” and “executory,” “perfect” and “imperfect,” have been sometimes applied ; but these again constitute a distinct class. We allude to such voluntary dispositions as depend for their equitable validity on the fact of their completion by an actual legal conveyance, or by some equivalent ceremony.—1 Hayes’s Conv. p. 86, *et seq.*

acquiring an estate as a voluntary grantee, even without notice, or as a devisee, will take it subject to every equitable interest.

Of course, if a person purchase of a trustee for a valuable consideration without notice, he will hold the estate discharged of the trust.

It is not clear, how far a purchaser will be affected by a constructive or doubtful trust.⁷⁷

9. The following are instances of resulting trusts:—

Resulting trusts.

(1) Upon a contract to purchase a real estate, a trust immediately results to the vendee.

“Equity looks upon things agreed to be done, as actually performed; consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor.

“The contract will not be discharged by the bankruptcy of either the vendor or vendee.

“The death of the vendor, or vendee, before the conveyance or surrender, or even before the time agreed upon for completing the contract, is in equity immaterial.

“If the vendor die before payment of the purchase-money, it will go to his executors, and form part of his assets; and even if a vendor reserve the purchase-money, payable as he shall appoint by an instrument, executed in a particular manner, and afterwards exercise his power, the money will, as between his creditors and appointees, be assets.”⁷⁸

The estate, provided the contract be binding, and a good title can be made, is considered as the real property of the vendee; and *vendible*, *chargeable* and *deviseable* by him, even under general and sweeping words in a will, and it would descend to his heir, and may be assets.

(77) 1 Sand. Uses and Trusts, c. iii. § 7, p. 351.

(78) Sugden's Vendors and Purchasers, c. iv. § 1.

(2) Where a purchase is made in the name of one, and the consideration is given, or paid by another, a trust results in favour of the latter, though there be no express declaration for the purpose; but not so, if the purchase-money were paid by several, for that would be to introduce all the mischiefs which the statute of Frauds was intended to prevent. To raise a trust of this kind, the fact of the ownership of the money should appear upon the face of the deed, either by a recital, or by expressions, which amount to a necessary implication, or presumptive proof of it.

(3) A purchase by a trustee with the trust-money, will raise a resulting trust to the person, entitled to such money.

(4) A conveyance to a man, without consideration, raises a resulting trust for the original owner.

(5) Where a trust is declared in part of an estate only, what remains undisposed of results to the grantor.

(6) When the trusts created cannot take effect, a trust will result to the original owner or his heir.

(7) Where a conveyance is made to trustees, upon such trusts, and for such intents and purposes as A. shall appoint, and A. never appoints, the trust results to him and his heirs.

(8) If a trustee renew a lease in his own name, such lease will be subject to the trust, affecting the old lease.

(9) Where there is fraud in obtaining a conveyance, the grantee will be held, in equity, as a trustee for the person defrauded.

(10) A wife cannot be a trustee for her husband; if then a husband purchase lands in his wife's name, it is presumed to be a provision for her.

(11) Where a son is married in the lifetime of his father, and by him fully advanced and emancipated, there a purchase by the father, in the name of his son, may be a trust for the father, as much as if it had been in the name of a stranger: because in that case all presumptions and obliga-

tions of advancement cease. But, where the son is not advanced, or but advanced or emancipated in part, there is no room for any construction of a trust by implication; and without clear proofs to the contrary, it ought to be taken as an advancement of the son,⁷⁹ although the father take the possession, and receive the rents and profits. If a grandfather purchase lands in the name of his grandchild, the father being dead, it is an advancement, and not a trust; for the grandfather is *in loco parentis*. And it is the same, if a father purchase in the names of his son and a trustee, or in the names of himself and son.⁸⁰

10. Trusts may be declared either by writing, or by implication.

The Statute of Frauds—29 Car. II. c. 3. § 7—enacts:—
That all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested, and proved by some writing, signed by the party, who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of none effect.

How trusts
may be de-
clared.

No particular form is required; a letter from a trustee, disclosing a trust, will be sufficient; so a trust confessed in a defendant's answer in Chancery. And the lord of a manor, admitting a tenant, upon the trusts of an indenture referred to in the surrender, is considered to consent to the trusts, and is bound by them upon the trustee dying heirless.⁸¹

The same statute, by § 8, provides:—That where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like

(79) *Vide* Cruise's Dig. title xii. c. 1. § 40, to the end of the chapter.

(80) 1 Sand. Uses and Trusts, c. III. § vii. p. 357.

(81) *Weaver v. Maule*, 2 Russ and M. 97.

force and effect, as the same would have been, if this statute had not been made.

Incidents of trusts.

11. The incidents of trusts are these :—

(1.) Their modifications of interests, (which might be for years, for life, in tail, or in fee :) are wholly independent of tenure.

(2.) They descend according to the canons of descent relating to legal estates, and are subject to the peculiar customs of borough-english and gavelkind, where such customs prevail.

(3.) They may be assigned in equity, and so may a possibility of trust; and, they may be devised. 29 Car. II. c. 3, § 9.

(4.) They may be entailed, like legal estates: or limited for life.

(5.) They are subject to dower, when the marriage has been since 1st January, 1834, and also to curtesy, although the trust be declared, during the wife's life, for her separate use, unless a power of disposition be reserved to the wife.

(6.) Where both the legal and equitable estates meet in the same person, the equitable will merge in the legal, for a person cannot be trustee for himself, but the two estates must be co-extensive and commensurate.

(7.) The *cestui que* trust of a term for years forfeits it for felony, and upon an outlawry in a personal action.⁸² But the trust of an inheritance will not escheat to the lord, upon the attainder of the *cestui que* trust, for felony, or for want of heirs; the trust, however, will be absolutely determined.

(8.) They are considered as legal estates in the construction of Acts of Parliament.

(9.) The beneficial interest of the *cestui que* trust is not lost, by the attainder of the trustee, nor by his attainder.

(10.) If an alien be a trustee, and the estate be freehold,

(82) *Earl of Somerset's case*, Hob. p. 214.

the crown may take possession, and direct the execution of the trusts. So with respect to those leaseholds, which upon office found, the Crown shall have. But as to copyholds, the right of the Crown is questionable, since the Sovereign cannot hold of a private lord, or do suit and service as a copyholder. It is said, that in the case of copyholds, the Crown may take, and the lord loses his seignory, but this hardship might be obviated, by the Crown appointing a person, to be admitted as tenant, and to be answerable to the Crown for the profits.⁸³

If the *cestui que* trust be an alien, and the estate is freehold, or copyhold, the trust is forfeited to the Crown. If leasehold, the Crown will be entitled to the trust, when it would be entitled to seize, if the legal estate were in an alien.

(11.) They are liable to executions upon judgments, statutes, and recognizances. 29 Car. II. c. 3. § 10.

(12.) They are assets for the payment of the *cestui que* trust's debts.

(13.) And are subject to extents from the Crown and forfeiture for treason. 33 Hen. VIII. c. 20, § 2; 13 Eliz. c. 4, § 5; 25 Geo. III. c. 35.

(14.) No length of time will operate, between trustee and *cestui que* trust, in direct trusts, so as to bar the equitable rights of the *cestui que* trust, since between them there is no adverse possession; but in constructive trusts, long acquiescence may bar all equitable claims; and now, by statute, a mortgagor is barred of his equity of redemption, after a possession of the property pledged by the mortgagee for twenty years, without any assertion of title on the mortgagor's part.⁸⁴

A trust is equivalent to the legal ownership, and equity, so far as it is practicable, construes trusts upon principles analogous to law, in pursuance of the maxim *Æquitas*

(83) 1 Sand. Uses and Trusts, c. iii. § 4, p. 508, n. 8.

(84) 3 & 4 Wm. IV. c. 27, § 28; 1 Vict. c. 28.

sequitur legem. The above enumeration of the incidents to trusts, plainly manifests this rule.

The notional
transmutation
of property.

12. From trusts, there is derived an equitable principle, relative to the constructive conversion of property, which is this:—that money directed to be employed in the purchase of realty, and realty directed to be sold and turned into money, are considered in equity as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given; whether by will, by contract, marriage articles, settlement or otherwise; and whether the money is actually deposited, or only covenanted to be paid, or whether the land is actually conveyed, or only agreed to be conveyed.⁸⁵ This principle is governed by the doctrine of equity, that that which ought to be done shall be deemed as actually done.

The property thus equitably transmuted by anticipation, will possess all the qualities, incidents and peculiarities of that kind of property, into which it is destined to be changed.⁸⁶

But the beneficiary may elect, to take the property in the shape it then is, before the actual conversion takes place. Slight evidence of an intention so to elect will be sufficient. When a person, entitled to the fee-simple of an estate to be purchased with trust money, and without requiring the purchase to be completed, causes the securities for the money to be changed in the name of a trustee, in trust for himself, *his executors and administrators*;⁸⁷ and where a person entitled absolutely to the money to arise by the sale of real estate, makes a lease of the estate itself, reserving rent payable to him, *his heirs and assigns*;⁸⁸ these circumstances have been considered to amount to an election.

(85) *Fletcher v. Ashburner*, 1 Bro. C. C. 497.

(86) *Vide* 3 & 4 Wm. IV. c. 74, § 71.

(87) *Lingen v. Souray*, 1 P. W. 172.

(88) *Crabtree v. Bramble*, 3 Atk. 380.

The nature of the fund cannot be altered by the election of a trustee or an infant.

13. Any person, capable of taking the legal estate, may acquire the equitable estate in the same property. The Queen may be a *cestui que* trust or beneficiary; and so may a corporation, with a license in mortmain; but an alien cannot. Who may be a *cestui que* trust.

The *cestui que* trust can proceed against his trustee in Chancery only, for an account of monies, or a breach of the trust; he has no remedy against him at the Common Law. A trustee is bound, both at law and in equity, by every disposition of his *cestui que* trust.

14. It is a maxim of equity, that a trust shall never fail for want of a trustee. The Queen or a corporation may be a trustee, and a husband is held to be a trustee for his wife as to separate estate, to which a trustee has not been appointed. If a trustee decline to act, or become incapable, the trust devolves upon the Court of Chancery, which appoints a proper person to perform the trust. Who may be a trustee.

A trustee has the legal estate entirely for the advantage of the *cestui que* trust; it is protected against his bankruptcy, judgments, and incumbrances,⁸⁹ and also from dower, freebench and curtesy, so far as he is concerned: it

(89) With respect to his power to prejudice his *cestui que* trust by alienation, the single case, in which his alienation of the estate can bind the *cestui que* trust is, where being in possession of the estate, he conveys it for a valuable consideration, and without notice: in which case, the purchaser will be entitled to hold the estate against the *cestui que* trust. *Pye v. George*, 1 P. Wms. 128, 1 Bro. P. C. 359; *Vernon v. Vaudey*, Barnard, 303; *Watson v. Corbett*, Rep. Temp. Finch, 411. As to incumbrances, it seems agreed that mortgagees for valuable consideration, and without notice of the trust, are to be considered as purchasers, a mortgage being a specific lien; but, as to specialty or judgment,—creditors, who have only a general lien, they are not in equity allowed to hold against the *cestui que* trust. *Finch v. Earl of Winchelsea*, 1 P. Wms. 278; *Medly v. Martin*, Finch's Rep. 63.

neither escheats for want of heirs of the trustee, nor is it forfeited for his treason or felony.⁹⁰

Where trustees are incapacitated from conveying the trust-estate, by being infants, or becoming lunatic, or where they cannot be found, the Court of Chancery can convey by order, in pursuance of 13 & 14 Vict. c. 60, which abolished the 1 Wm. IV. c. 60; 4 & 5 Wm. IV. c. 23, and 1 & 2 Vict. c. 69.

A trust estate will pass under a general devise, unless the testator otherwise direct. A trustee cannot alter the nature of the trust-property; nor vary securities without an express power; nor will his *laches* prejudice the *cestui que* trust. A trustee is not liable for accidental losses, which do not happen through his own default or neglect.

Duties of a trustee.

15. The duties of trustees, which equity will compel them to perform, are these:—(1) to permit the *cestui que* trust to receive the profits of the estate; (2) to execute such conveyances as the *cestui que* trust shall direct, where the whole of the trust belongs to him; and (3) to defend the title of the property in any court of law or equity.

Where purchasers are bound to see trusts performed.

16. “Where a trust,” remarks Sugden,⁹¹ “is raised by deed or will for sale of an estate, a clause, that the receipts of the trustees shall be sufficient discharges for the purchase-money, is mostly inserted, and rarely ought to be omitted; because, notwithstanding that a purchaser would, at law, be safe in paying the money to the vendors, although trustees, yet equity will, in some cases, bind purchasers to see the money applied according to the trust, if they be not expressly relieved from that obligation by the author of the trust; and where the purchaser is bound to see to the application of the money, great inconvenience fre-

(90) 13 & 14 Vict. c. 60, § 46.

(91) Vend. and Pur. c. xvii. § 1. and see the whole chapter, which reviews the leading cases on this subject.

quently ensues, and, in some instances, it would be difficult to compel the purchaser to complete the contract."

With respect to realty, and in the absence of the trustees' receipt clause, if the trust be such that a purchaser may reasonably be expected to see to the application of the purchase-money, as if it be for the payment of legacies and debts scheduled or specified, he is bound, in every case, to see the money applied accordingly.

Where a trust is for payment of debts generally, or for debts generally and also for payment of legacies, the purchaser is not then bound, unless perhaps there have been a decree to pay debts, since that reduces it to as much certainty as a schedule of the debts. A purchaser is not bound to see that only so much of the estate is sold as is necessary for the purposes of the trust.

Where a purchaser is bound to see the money applied according to the trust, and the trust is for payment of debts or legacies, he must see the money actually paid to the creditors or legatees.

In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one. Or, if the creditors or legatees are but few, they may be made parties to the conveyances.

Another mode, by which the purchasers may be secured, is an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration, that his receipts shall be sufficient discharges; and then the trustee can be made a party to the several conveyances.

With regard to leasehold estates; they must go to the executors to be applied, in the first place, in a due course of administration, which is tantamount to a bequest for payment of debts generally. And, therefore, in analogy to the decisions upon devises of real estates for a similar purpose, it is incontrovertibly settled, that a purchaser of personalty shall in no case be bound to see to the applica-

tion of the purchase-money, where he purchases *bonâ fide*, and without notice that there are any debts.

It is a very common practice, to direct the money arising from the sale of lands to be invested in the funds in the names of the trustees, upon several trusts; nor does it appear to have ever been judicially settled, to what extent a purchaser is bound to see to the performance of such a trust.

In a case of this kind, the late Mr. Booth⁹² says:—

“ I am of opinion, that all that is incumbent on the purchaser to see done in this case, will be to see, that the trustees do invest the purchase-money in their own names, in some of the public stocks, or funds, or on government securities. And in such case, the purchaser will not be answerable for any non-application (after such investing of the money) of any monies, which may arise by the dividends, or interest, or by any disposition of such funds, stocks, or securities: it not being possible, that the testator should expect, from any purchaser, any further degree of care or circumspection, than during the time that the transaction for the purchase was carrying on. And, therefore, the testator must be supposed to place his sole confidence in the trustees. And this is the settled practice in these cases. And I have often advised so much, and no more to be done; and particularly, in the case of the trustees under the Duchess of Marlborough’s will.”

The rules as to trustees becoming purchasers.

17. A trustee is, as a general rule, incapable of purchasing the trust-property, for he would by so doing be placing himself in a position, where his interest would conflict with his duty, and thus endanger his honor. Neither can he buy it, as agent for another, or employ a third person to contract or bid for the estate on the behalf of a stranger.

There are three purposes for which estates are vested in

(92) Cases and Opin. vol. 2, p. 114, quoted by Cruise in his Digest, tit. xii. c. iv. § 23.

trustees for sale; viz. (1) for the benefit of creditors; (2) for persons *sui juris*; and (3) for persons not *sui juris*.

In the first case, it appears, that all the creditors should consent to the trustee becoming the purchaser; although Lord Hardwicke's⁹³ opinion was, that the consent of a majority would suffice.

In the second case, if the *cestui que* trust clearly discharge the trustee from his trust, he may then purchase; but, the *cestui que* trust should have freely consented to such trustee retiring from the trust, after being fully informed of all the circumstances connected with the trust.

In the third case, the trustee can only purchase, with safety to himself, by leave of the court, showing that he will give more for the estate than any other person.

A purchase by a trustee may, however, be confirmed by the *cestui que* trust, after he is acquainted with all the circumstances.

As to the remedy, where a trustee has improperly purchased the trust property:—

If the *cestui que* trust require a re-conveyance of the estate, he must repay to the trustee the original price of the estate, and also all sums laid out for permanent benefit and improvement of it, with interest thereon from the times they were actually disbursed; and, on the other hand, the trustee must pay and allow all the rents received by him, and the yearly value of such portion of the estate as have been in his own occupation, and all sums received by the sale of timber or other parts of the inheritance, and interest thereon, from the periods of their being received.⁹⁴

And where the *cestui que* trust is not desirous to take back the estate, he may require it to be put up to sale again, at the price at which it was bought by the trustee, and if any one bid more, the trustee shall not have the estate: but if not, then that he may be compelled to keep it.

(93) *Whelpdale v. Cookson*, 1 Ves. 9.

(94) *York Buildings' Company v. Mackenzie*, 8 Bro. P. C. 42.

If the trustee have actually sold the estate, the *cestui que* trust may compel the trustee to pay him what he may have received over and above the original purchase-money.⁹⁵

Trustees must
act jointly.

18. Since trustees have all equal authority, they must join⁹⁶ in executing all deeds, and in signing all receipts; they cannot act separately; yet, only the trustee who actually receives the property, will be accountable for it, unless the concurrence of the others involves in it culpable negligence. In instruments creating trusts, there is usually inserted a clause of indemnity, that the trustees and their heirs shall not be accountable for more than they receive.⁹⁷

They can
derive no
benefit from
the trust.

19. Trustees are not allowed to derive any benefit⁹⁸

(95) *Exp. Reynolds*, 5 Ves. 707; and see Sugden's *Vend. and Pur. c. xix.* § 2.

(96) But where there are more than one, there is a difference between trustees and executors. For trustees have all equal power, interest, and authority; and cannot act separately, as executors may, but must join both in conveyances and receipts; for one cannot sell without the other, or desire to receive more of the consideration-money, or to be more a trustee than his partner. And therefore it is against natural justice to charge them for each other's receipts, unless in a case of necessity, where they so join in a receipt, as not to be distinguished what has been received by one, and what by the other, there, from their own neglect or default, both shall be charged with the whole. As if a man should blend his money with mine, by rendering my property uncertain, he loses his own. But executors have each an absolute power over the whole, and therefore if they join they trust one another.—*Fonblanque on Equity*, B. II. c. vii. § 5, vol. ii, p. 180.

(97) Where there are two or more trustees, the rule is, that each of them shall be charged for his own wilful neglect, default, or breach of trust only; and that the innocent trustee shall not suffer for the misconduct of his co-trustee. Therefore, it has been decided, (*Leigh v. Barry*, 3 Atk. 584), that a trustee, who has joined in a voucher for the whole trust-money, but has in truth only received a part of it, shall be charged for so much only as has actually come to his hands; unless indeed fraud, or, what is tantamount to it, gross negligence, should appear in the transaction.

(98) In the case of *Robinson v. Pett*, (3 P. W. 251), Lord Talbot said, It was an established rule, that a trustee should have no allowance for his care and trouble in the management of the trust; for if, on those pretences, allowances were to be made, the trust might be loaded, and rendered of little value;

whatever from their trust, which is deemed an honorary office, and not undertaken for mercenary motive: and they are not entitled to any remuneration for their care, time and trouble about the execution of their trust. But they will be allowed all their actual costs and expenses, unless guilty of improper conduct.⁹⁹

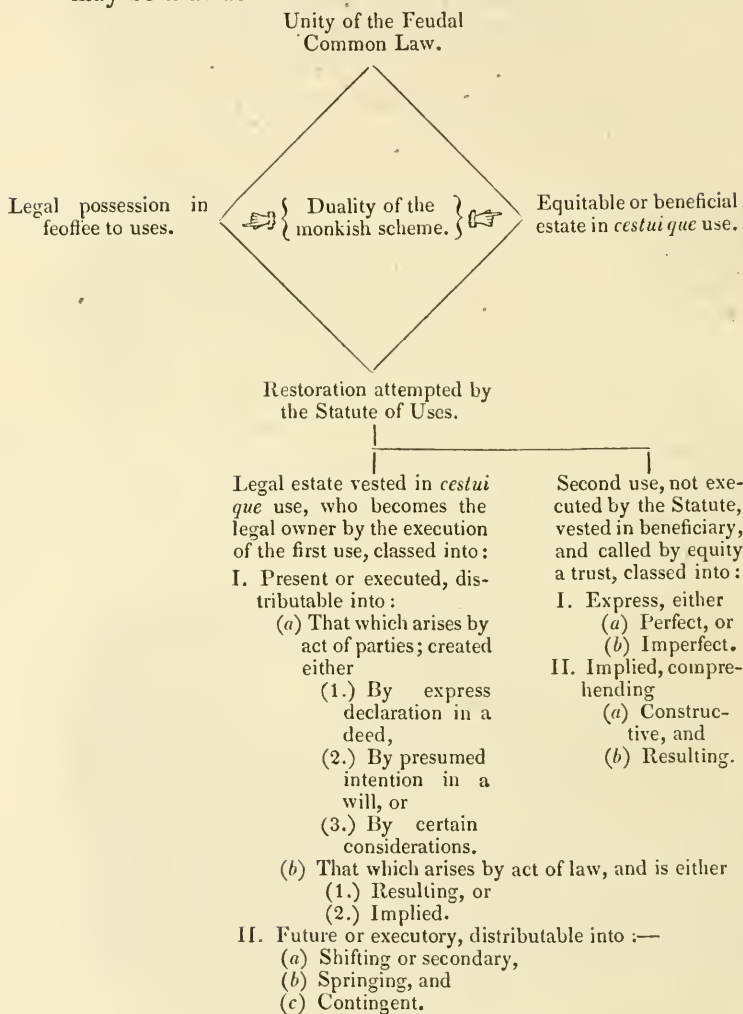
20. Where a trustee has once accepted the trust, he will be compelled to complete the duties of it: but otherwise, The relinquishment of a trust. he cannot be compelled to act. A proviso should always be introduced into trust-instruments, that in case of any of the trustees dying, or being desirous of relinquishing the trust, or becoming incapable of acting, a new trustee shall be appointed, either by the *cestui que* trust or the other trustees; and that the property shall be conveyed to such new trustees, jointly with the remaining trustees. In the absence of such a proviso, the Chancery will appoint a new trustee, as, in such a case, the trust devolves upon the court.

that a great difficulty might attend in settling and adjusting the *quantum* of such allowance, especially as one man's time might be more valuable than that of another; and that it could be no hardship upon any trustee, for it was at his option, either to accept or refuse the trust. But, if a trustee come in a fair and open manner, and tell *cestui que* trust, that he will not act in such a troublesome and burdensome office, without further compensation given by *cestui que* trust, over and above the terms of the trust, and such terms be contracted for between them, this contract, Lord Hardwicke observed (2 Atk. 60), would not perhaps be set aside, though there was no precedent wherein such a bargain had been confirmed. It would now be valid, 3 Beav. 341.

(99) Lord King (2 P. W. 455) said, It was a rule that a trustee ought to be saved harmless by *cestui que* trust, as to all damages relating to the trust. Thus, where a trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the *cestui que* trust was discharged from being liable to pay a greater sum, or from a plain and great hazard of being so, the trustee ought to be repaid.

Diagrammatic conclusion.

21. The salient points of the doctrine of Uses and Trusts may be thus delineated :—



PART II.

A

SKETCH OF THE DOCTRINES

RELATING TO

POWERS.

“ In conveyances to an use, a man may direct and model the use as he pleases, and the Statute 27 Hen. VIII. c. 10, executes the possession to the use; and therefore, he may annex powers to estates, which cannot be annexed to them by a conveyance at the common law.”—
LORD C. B. COMYNS (Digest, tit. “ Pojar” (A. I.))

THE ARRANGEMENT OF PART II.

CHAPTER I.

NATURE, ORIGIN AND DIVISION OF POWERS.

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CHAPTER I.

NATURE, ORIGIN AND DIVISION OF POWERS.

1. Definition. 2. Whence they originate. 3. Their division.

1. A **POWER** is an authority¹ retained by, or conferred Definition.
upon, a person, to deal with property, so as to affect more
or less interests or estates therein possessed, either by him-
self or by others, albeit it be underived therefrom.

The person, conferring or reserving the power, is called
the donor, he, upon whom it is conferred or who reserves
it, the donee, though when he exercises it, he is then the
appointor, and the person, in whose favour it is exercised,
the appointee.

2. Powers exist either

Whence they
originate.

- (1) At the Common Law;
- (2) By particular custom;
- (3) In Equity originally, and afterwards by force of
the Statute of Uses; and
- (4) By other statutes.

Amongst the most familiar instances of powers existing
at the Common Law are the following:—Powers of sale
created by will, for the estate passes by force of the will,
and the person who carries out the power simply nominates
the party to take the estate; powers of attorney, but in
such cases the estate is not transferred by the instrument
giving the power; limitations to one person for life, with a

(1) Although it has been attempted to draw a distinction between a power
and an authority (3 Prest. Conv. 265), yet our law recognises no distinction
between them.

subsequent limitation to another, whom a given party shall specify; leases for so many years as a named person shall fix; powers under bonds to convey such estates, or to pay certain monies, to such persons as another shall appoint.

Powers by particular custom are for the most part created in copyholds, as powers of sale in wills, which are not opposed to the particular customs of the particular manor.²

From the very limited facilities afforded at the Common Law³ for the creation and effect of powers, equity was induced to render every aid to their operation by removing all legal difficulty and inconvenience, and having recourse to the machinery of uses.⁴ Thus a father might have conveyed an estate to A in fee, to the use of his son, with a provision that the father might have power to revoke the

(2) *Vide Boddington v. Abernethy*, 5 B. and C. 776.

(3) Mr. Powell's opening remarks in his *Essay on Powers*, 2nd edit. 1799, are these:—"From the nature of alienations of real property at common law, and the mode of effecting them by feoffment and livery of seisin, it is very certain that they did not admit of the annexing to them a power of revocation or appointment; for the strictness of those times would not countenance a repugnancy, which a man's giving an estate *absolutely* to another, and yet *reserving* to himself a liberty to *recall* it from the feoffee at pleasure, or to *determine* it, and *create* a new estate to another without a new livery, appears, in theory, to be. Nor was an operation of this kind consistent with that public notoriety which the policy of our ancestors deemed a necessary circumstance in the alienation of property. The only means, therefore, that our ancestors had of retaining any authority over real property after alienation, was, by annexing a condition to a feoffment, that, on the tender of money, or, of other things performed by the alienor to the alienee or his heirs, as stipulated between the parties, the alienor should have a right of re-entry; so that the estate which was divested out of the alienor by the livery of seisin, might be re-vested in him by a performance of the condition and re-entry."

(4) A use was an accident attaching upon the legal possession, and built thereupon by civil equity. Its essence was no more than a confidence reposed in him who had the possession to this effect; namely, that, so long as that possession continued, he should admit the feoffor to take the profits, and should make such estates as the feoffor required. That, then, which we call a limitation of an use, is no more than the direction of a trust, prescribed by the feoffor to the feoffee, which direction might be subjected to such conditions and limitations as the donor pleased. The donee was bound, in equity, to

use to the son, and resume the estate: upon the father's exercise of such power, A would have become at once a trustee for the father instead of the son, to the extent of the revocation, for the father might have wholly or partially extinguished the power in equity, which it is manifest could not have been effectuated at the common law. Again, equity permitted such an arrangement as the following, which the common law would never have listened to:—A father conveying his estate to A in fee, in trust for his children, but subject to a power of varying their shares, or excluding any one or more of them, so as to give the children at once vested interests in fee, subject to their interests being wholly or partially divested in favour of the other or others of them, the trust varying from time to time, according to the expressed intention of the settlor. The father reserved to himself this power, the legal estate

perform the trust according to these directions, so long as the possession remained with him. From hence it followed that the feoffor might limit an use in fee-simple to one, upon condition or limitation, and, after the determination of that use, to another; all which limitations were performable by the donee; because his *possession* that he had received subject to the *trust*, remained *in him* not determined: and if the donor or feoffor could not have limited a future use upon the determination of the first use, the donee or feoffee would have retained the possession without trust; and that would have been against the rules of equity, which is the guide of trusts and uses: then the principle upon which uses were founded being, that the donee of an estate, accepting thereof upon a confidence, was bound in conscience *strictly* to pursue the directions of his donor, the operation upon the conscience of the donee was the same, whether the stipulation was to permit the donor to recall the estate back to himself at his pleasure, or for the donee to hold it in trust for others named in the original conveyance, or in trust for persons *at the future* appointment or nomination of the donor, or other person to whom he delegated such appointment or nomination. These powers, therefore, were originally *mere* modifications of uses, taking effect as directions to trustees which bound their conscience, and which they were compellable in a Court of Equity to perform. And this mode of conveyance was preferable to that by way of condition; because, if, in the latter case, the condition were to be broken, the heir only could take advantage of it, which would frustrate the intent of the feoffor; whereas, in the former case, a court of equity compelled a strict performance of the trust in favour of any person nominated by the donor to take the beneficial interest.—*Powell on Powers*, p. 3.

being vested in another, which, however, would not be divested by the execution of the power, although equity compelled the person seised of it to clothe the estate so created with the legal right. Powers before the Statute of Uses were mere directions to the trustee of the legal estate how to convey it; they were, in fact, future uses to be indicated by the person to whom the power was given.

These directions operated only on the conscience of A, the legal owner, in the two illustrations above given, but when the Statute of Uses (27 Hen. VIII. c. 10) converted the equitable interest into the legal estate, by turning the use into possession, limitations at law became subject to the various modifications previously prevailing in equity, and thus arose powers relating to freeholds and transfers *inter vivos*, which are a species of shifting or future use.

Mr. Booth's opinion as to the nature of powers under and by virtue of the Statute of Uses, is of great value. He says :⁵—

“ By the old law no fee simple could be limited upon or after a fee simple ; but since the statute of uses, executory fees, by way of use, have not only been allowed, but are become frequent in all conveyances, operating by way of transmutation of possession, the uses are served out of the seisin of the feoffees, grantees, releasees, &c. In all future or executory uses, there is, in the instant they come *in esse*, a sufficient degree of seisin supposed to be left in the feoffees, grantees, &c. to knit itself to, and support those uses; so as that it may be truly said, the feoffees or grantees

(5) 1 Coll. Jurid. 422, end of Sheppard's Touchstone. The whole opinion is worth an attentive perusal. It may be observed, that every power of this kind is a power of revocation and new appointment; for the new uses and estates created under the appointment, must necessarily (as to the extent of such appointment) revoke, defeat, or abridge the uses which existed and were executed, previously to the new limitation. Sometimes an express power of revocation is limited prior to the power of appointing new uses. But this is never necessary.—2 Vern. 511.

stand seised to those uses, and then, by the force of the statute, the *cestui que* use is immediately put into the actual possession [*i. e.* seisin.] It is wholly immaterial how, or by what means, the future use comes *in esse*; whether by means of some event provided for, in case it happened, in the creation of the uses; which event may be called the act of God; or by means of some work performed by any certain person, for which provision was likewise made, in the creation of the uses, which may be called the act of man; in either case, the statute operates the same way; for the instant the future use comes *in esse*, either by the act of God, or by the act of man, the statute executes the possession [seisin or estate] to the use, and the *cestui que* use is deemed to have the same estate in the lands as is marked out in the use, by the deed that created it. When the use arises from an event provided for by the deed, it is called a future, a contingent, an executory use; when it arises from the act of some agent or person nominated in the deed, it is called, a use arising from the execution of a *power*. A use may arise by the act of man, without any power; as to the use of A and his heirs, and if B should pay a sum of money, &c. then to the use of B and his heirs; this is a future, or a secondary and contingent use. It is to arise by the act of man, but it arises without and independent of any power. In truth, both are future or contingent uses till the act is done; and afterwards they are, by the operation of the statute, actual estates. But till done they are in suspense; the one depending on the will of heaven, whether the event shall happen or not, the other on the will of man.

“Whilst these last are in suspense, (and given by way of power or authority,) they are called *powers*. It is absolutely immaterial to the creation of the powers, whether they are reserved to the parties that created the uses, or to any one having any actual use or estate under any limitation in the deed of uses, or to the feoffees, grantees, or re-

leasees, or to an absolute stranger. They all operate the same way; indeed they have different names according as they are reserved to the persons aforesaid, and different rules are established for their interpretation, as they are of one kind or another. Some are powers appendant, (as to lease;) some are powers in gross, (as to sell and exchange;) some are powers collateral, (as to raise a sum of money, &c. or powers which will not effect the estate of the donee of the power); but still the statute executes the possession (*viz.* seisin or estate) to the use that arises on their execution, in the same manner, and by the same method of operation.”⁶

Powers are frequently created by statute, as the Bankrupt-Statutes, the Land-Tax acts to sell estates, Inclosure, Canal and private acts. These powers are frequently called common-law authorities, as not arising, even when exercisable over freehold estates, out of any seisin to serve uses, and as conferring by their exercise a common-law seisin or interest.

Their
division.

3. It is difficult to give a classification of powers, deriving their effect from the Statute of Uses: no two writers are agreed upon it, and Sir Edward Sugden⁷ considers it of importance only with reference to the donee's ability to suspend, extinguish, or merge the power.⁸

Powers,⁹ in relation to the donee or person possessing them, are of two kinds, *viz.*:—

- (1) Restraining powers, and
- (2) Enabling powers.

A restraining power arises, when the owner of an estate conveys it to trustees, reserving a power to himself, under particular circumstances and certain restrictions, to revoke,

(6) *How v. Wingfield*, Sir Thomas Jones, 110.

(7) 1 Powers, 48.

(8) Consult Powell on Powers, 6—12; 1 Sugden on Powers, 7th edit. 1845, c. i. § 4; or 1 Chance on Powers, 1831, c. i. § 2.

(9) Powell on Powers, p. 6.

alter, enlarge, or diminish the trusts declared therein. It is a restraining power, because the owner, who might have alienated his estate in any mode, conveys it subject to a power, which confines him not to alienate it by any other means, or under any other circumstances than those which he has thus laid down.

An enabling power confers upon persons, not seised of the fee, the right of creating interests out of it, which could not be done by the particular tenant or donee, unless by virtue of such delegated authority. And this is called an enabling power, because it gives a right to create interests, which are to take effect out of estates vested in other persons.

These enabling and restraining powers¹⁰ are either

- (1) Appendant or appurtenant,
- (2) Collateral or in gross, or
- (3) Simply collateral, which are either:—
 - (a) General, or
 - (b) Special.

Powers of the first kind strictly depend upon the estate limited to the person to whom they are given, as a power to grant leases in possession out of an estate limited for life to the donee, who enjoys his estate by virtue of the deed creating the power; and so, any other power, which enables the donee to create an estate, which will attach on an interest actually vested in himself.

(10) Lord Hale in *Edwards v. Slater*, Hard. 419, thus divided them:—
 “ Powers to raise estates are either simply collateral,—as where a party that has such power has not nor ever had any estate in the land, as where such power is reserved to a stranger,” being “ a bare nomination,—or not simply collateral: and these latter are of two sorts; first, appendant and annexed to the estate; secondly, in gross.” He then instanced, as a power of the first sort, a power to a tenant for life to make leases; but where the power does not fall within the estate, as here,” the “ power is not appendant or annexed to the land, but is a power in gross,” but still subject to destruction; adding afterwards, that “ it is a power annexed” to the reversion; “ but till then it is a collateral power and in gross,” “ *quoad* the remainders in tail, which are precedent to it,” that is, the reversion.

Powers of the second kind are given to persons, who had an interest in the estate at the execution of the deed creating the power, or to whom an estate is given by the deed, but which enable them to create such estates only as will not attach on the interest limited to them. Such are the following:—An owner of the fee-simple, who reserves a power only, but settles his estate on others; powers to a tenant for life to appoint the estate, after his death, amongst his children; a power to a husband to jointure a wife after his decease; powers to raise a term of years to commence from the donee's death for securing younger children's portions; and a power to a stranger, having no estate limited to him, to charge the estate for his own benefit. They are powers in gross, because the donee's estate or interest is not affected thereby.

Mr. Powell observes (Powers, p. 12):—

“ Powers appendant, and in gross, are said to be, *not* simply collateral without interest; because, although the estates raised under such powers take effect *out of the estate* of the original creator thereof, yet the trustee of the power has an interest in the estate as well as in the exercise of the power; either, if it be a restraining power, as a power of revocation, to revest the estate in himself, &c., or if it be an enabling power, to transfer the estate, or to destroy such power by feoffment or otherwise. Therefore the person to whom it is limited, is, in law, considered as coming in under him who executes the power; and, in such case, he who gives *operation to and limits the use* is looked upon as the donor, and therefore his power is not considered as *merely collateral*, but savours and tastes (as it is said, in the pithy language of antiquity) of the estate and interest in the land.”

Powers of the third kind are those given to persons who have no interest in the estate, and to whom no estate is granted, to dispose of or charge the estate in favour of some other person. This is an instance,—a power to a

stranger, to revoke a settlement, and appoint new uses to other persons designated in the deed.

Mere collateral powers are general, when the donee has authority to appoint to any person he likes; and, special, when the appointees are specifically named.

The phrases "simply collateral," or "not coupled with an interest," or "not being interests," have been adopted, when speaking of this class of powers, to obviate the confusion that might arise, seeing that powers in gross are also called powers collateral.

Sir Edward Sugden remarks (1 Powers, p. 41):—"A power may, with reference to the different estates in the land over which it rides, have different aspects; it may, in regard to one, be a power appendant; in respect to the other, a power in gross. Thus, where an estate is settled to A for life, remainder to B in tail, remainder to A in fee, and A has a power to jointure his wife after his death, this power is collateral or in gross as to the estate for life, but appendant or appurtenant as to the remainder in fee. It *may* affect the latter, but can never attach on the former."¹¹

The broad rule is, that all powers take effect out of the estate vested in the creator of them; and their legal operation is by authority of the instrument which gives the power, so that great care should be used in their creation, as the appointor is bound to act in strict pursuance of his conferred authority.

(11) See also Powell on Pow. p. 13.

CHAPTER II.

THE CREATION OF POWERS.

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|---|---------------------------------|
| 1. The three requisites. | 3. Implied donee. |
| 2. Distinction between a power and an interest. | 4. The surviving of powers. |
| | 5. How a power may be reserved. |

The three
requisites.

1. IN order to create a power, it is required that there be
- (1.) Sufficient words denoting the intention ;
 - (2.) An apt instrument ; and
 - (3.) A proper object.

While no formal words are necessary to create a power, since a party may indicate his purpose in any words he may choose, yet language must be used expressive of an intention to give or reserve it.

Distinction
between a
power and an
interest.

2. As to the question, what is a power and not an interest, Sir Edward Sugden¹² has laid down these two principles :—

(1.) That where there is an express estate for life given, with a gift in default of appointment generally, as the devisee shall appoint, without any intervening estate to strangers, the devisee shall take for life only, with a power of disposition over the inheritance. The rule is more inflexible where a specific mode of exercising the power is pointed out. But

(2.) Where the estate for life is given in order to let in estates to strangers, and no specific mode is required to

(12) 1 Sug. Pow. c. iii. § 1, p. 125, and see the cases quoted throughout the section.

the disposition of the inheritance, there, in the event of the mesne estate not taking effect, the devisee shall take the entire fee-simple. These, however, cannot be treated as general rules applicable to every case. Wherever a power is clearly intended to be given, the devisee cannot be holden to take a fee.¹³

If a devise be made that executors "*shall*" sell lands, or that lands "*shall be sold*" by the executors, they have merely a power of disposition, passing no interest, for the devisor's heir takes the land by descent; but if the land be devised "*to*" executors to be sold, they then take the estate upon trust to sell.¹⁴ A devise of land "*to be sold by*" executors, without words giving the estate to them, confers a bare power only on the executors.¹⁵

3. Where estates are directed by a testator to be sold for certain purposes, but there is no mention by whom such sale is to be made, then, if the fund be distributable by the executor either for the payment of debts, expenses or legacies, he will impliedly have the power to sell, because it is his office to satisfy these matters, for to him is committed the charge of the will; and the executor of the executor might sell as long as the chain of representation remains unbroken, and the intent was, that the power should be executed by him, into whose hands the money was to come. Where the monies are directed to be divided generally among certain persons, or to be applied in paying certain sums not chargeable on the personal estate, the better opinion appears to be, that without other special circumstances, the power will not be in the executors.¹⁶ When the power is given to executors, they may exercise it, although they renounce probate of the will.

Implied
donee.

(13) 1 Chance's Pow. pp. 40—52.

(14) Year Book, 9 Hen. VI. p. 24 b, 25 a.

(15) 1 Sug. Pow. pp. 132—134; 1 Chance's Pow. pp. 52—62.

(16) 1 Chance's Pow. c. III. § 4 [173]

The 21 Hen. VIII. c. 4, provides, that where lands are devised to be sold by executors, and some of them decline to act, all sales by the executors, who accept the administration, shall be as valid as if all the executors had joined. The 1 Vict. c. 26, § 27, enacts: — That a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

It seems that under 1 Vict. c. 26, a general power by will to the survivor of two persons may be executed at any time by the will of the actual survivor.

The surviving
of powers.

4. At common law, a naked authority given to several cannot survive. And this is the rule as to powers operating under the Statute of Uses. But it appears

(1.) That where a power is given to two or more by their proper names, who are not made executors, it will not survive without express words;

(2.) That where it is given to three or more generally, as to "my trustees," "my sons," &c. and not by their proper names, the authority will survive, whilst the plural number remains;

(3.) That where the authority is given to "executors," and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it; but

(4.) That where the authority is given to them *nomina-tim*, although in the character of executors, yet it is at least doubtful whether it will survive;

(5.) And where the power to executors to sell arises by implication, the power will equally arise to the survivor.¹⁷

But to obviate all difficulty, the authority should be given to the executors, or the survivors or survivor of them, or to such or so many of them as take upon themselves the probate of the will, or the like.

5. A power may be reserved either in the body of a deed, or by an indorsement on it, or even by interlineation How a power may be reserved. before its execution, or by a deed of even date with the settlement. A power to lease to any person, reserved either in a bargain and sale, or a covenant to stand seised, is void, for to be good, the individual must be named in such a conveyance, with a proper consideration expressed. A general power of revocation may, however, be reserved in these deeds, which operate, as we have observed, by non-transmutation of possession. The effect of the execution of such a power, is simply to determine, either wholly or partially the uses limited; it introduces no new limitation in favor of any one, it merely restores the covenantor or bargainor to his original right, wholly or in part, or accelerates others of the original limitations. Such a power in such deeds may also be limited to a stranger.

No express words seem to be necessary to the creating of a power of revocation; for although a proviso for that purpose be unskilfully penned, yet, if the intention be

(17) 1 Sug. Pow. p. 146.

clearly to reserve such power, the court will construe the expressions used in creating the power so as to support the intention.

Nor will the *manner* of wording a power in such a proviso, so as to *distinguish* the *revocation* and *ceasing* of the former uses from the *limiting* the new uses, and *mark* them as *separate* acts, make *any* alteration in its *legal* construction.

Where a power of revocation is reserved, the estates, created by the deed in which such power is contained, may be defeated *several* ways; namely, First, by an *express* revocation. Secondly, by a revocation in law. As where the donee of the power does an *act* of a nature that is *irreconcilable* with the existence of the former uses; *quia non refert an quis intentionem suam declaret verbis, an rebus ipsis vel factis*; and when a man, having power to revoke, limits *new* and *other* uses, he *thereby* signifies his purpose to *determine* and *alter* the uses before limited.

And in instruments for raising and creating, or direction of uses and powers, as well as in all other modes of assurance, one general rule is to be observed, *viz. an adherence in the construction of them to the intention of the parties concerned therein, so far as it stands with the rules of law.*¹⁸

A seisin must be raised commensurate with the estates authorized to be created under the power, for, if a life-estate were conveyed to A, to such uses as B should appoint, and B were to appoint to C in fee, this disposition could not take effect beyond the interest conveyed to A.

A power may be reserved to revoke the whole settlement, or even one particular limitation in it, leaving the others unaffected. A power may also be reserved to raise concurrent interests for different purposes, as powers to a tenant for life, to grant a jointure to his wife, and to create a term, to commence from his death, for securing

(18) Powell on Powers, p. 243, *et seq.*

younger children's portions; in which case, during the continuance of the jointure, the term will not take effect in point of interest, but will go on in time, and the residue of the term that remains unexpired after the death of the jointress, will take effect in interest and no more.¹⁹

A power seeking to create a perpetuity is void.

(19) *Edwards v. Slater*, Hard. p. 410.

CHAPTER III.

THE DELEGATION, FORFEITURE, AND EXECUTION OF POWERS.

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|---|--|
| 1. Transfer by donee's act. | 6. The mode of executing a power. |
| 2. By Acts of Parliament. | 7. By what words. |
| 3. Forfeiture by operation of law. | 8. As to the circumstances which |
| 4. As to the execution of powers by
married women. | should attend the execution of a
power. |
| 5. By infants. | 9. Of powers to appoint new trustees. |

Transfer by
donee's act.

1. WHEN a power reposes a personal confidence²⁰ in a donee, to exercise his own discretion, such donee cannot by his own act transfer his power to the execution of another, the maxim being *delegatus non potest delegare*. Under a power to lease for life or years, it cannot be accomplished by letter of attorney. Executors or trustees with a power of sale cannot sell by attorney. On the same principle a person, whose consent is necessary to the due execution of a power, cannot authorize another, as his attorney, to consent to any execution of it.

But while a donee cannot delegate to another the confidence reposed in him, yet, he is permitted to execute the deed of appointment by attorney, unless a particular mode of execution is pointed out.

It is, however, to be borne in mind, that where the power

(20) A power given to one person, cannot be by him delegated to another: for if there be a power to A of personal trust and confidence to exercise his judgment and discretion, A cannot say that *that* trust and confidence shall be exercised at the discretion of B.

But if a power be expressly reserved to be executed by one and *his assignees*; in *such* case an execution by an assignee will be good, and a devisee will be a good assignee within the words of such power.—Powell on Powers, p. 371.

is originally authorized to be executed by the donee "and his assigns," the donee can transfer it, if the power be annexed to the donee's interest, so as to enable the assignee of such interest to execute it. And, of course, if there be an express authority to delegate the power, it can be transferred, though it be not joined to an interest. So, if the power be tantamount to an ownership, neither involving a confidence nor a personal act, it may be executed by attorney: *ex. gra.* an estate limited generally to such uses as A shall appoint, A may limit it to such uses as B shall appoint, for the power is equivalent to the fee-simple.²¹

If a non-transferable power be delegated, the delegation is void, and the estate limited over in default of appointment, is at once accelerated and takes effect.

2. The statute law provides for the transfer of powers in many cases; thus, powers vested in bankrupts or insolvents, which they might legally exercise for their own benefit, except the right of nominating to any vacant ecclesiastical benefice, vest in their assignees by virtue of their appointment, to be by them executed for the benefit of the creditors, in such manner as the bankrupt or insolvent might have done.²² By Acts of Parliament.

(21) That such an exercise of the power is valid is easily explained.—Estates arising from the execution of powers being in the nature of springing uses, the seisin which is to supply them is not disturbed until some use is actually raised; thus, in the instance given, A points out no certain use on which the statute can operate; and the seisin remaining undisturbed, his appointment amounts only to a delegation of his power to B, which, as no confidence for the benefit of another was reposed in A on the creation of the power, there is no rule to prevent him doing, and the statute is not called into operation until some certain use is designated by B, or some future delegatee of the power, so that the final use may remain unappointed for an indefinite period of time, and no perpetuity can arise from this, because uses are vested till appointment, and the power dies with the person.—Watkin's Conv. B. I. c. xxi.

(22) 12 & 13 Vict. c. 106, § 147; 1 & 2 Vict. c. 110, §§ 11, 13, 49 & 101; 5 & 6 Vict. c. 116; and 7 & 8 Vict. c. 96, § 11. See also 1 Wm. IV. c. 47, §§ 11 & 12; 1 Wm. IV. c. 65; and 13 & 14 Vict. c. 60.

It is questionable, whether these statutes comprehend a power of leasing a settled estate, or other powers in a settlement, having for their object the general benefit of the estate; a power of jointuring would not vest in the assignees; so a power to appoint property by will, for no one person can make another person's will. The exercise of these powers by the assignees would yield no assets for creditors.

Forfeiture by
operation of
law.

3. The benefit of powers, by which land might have been reduced into possession by an attainted person, but for his attainder, is forfeited to the Crown,²³ but where the power is inseparably annexed to the person or mind of the donee, a forfeiture does not ensue an attainder. It is only when the thing to be done is a mere ministerial or formal act, not inseparably annexed to the person or mind of the donee, and which may be performed by one as well as another, that the power, on attainder, will vest in the Crown. It is not, however, the practice in our day to create such separable powers.

As to the execution of
powers by
married
women.

4. To the question—who is by law capable of executing a power?—the answer is—every person, who can legally dispose of his own property.

A married woman may execute a power, whether appendant, in gross, or simply collateral, and as well over copyholds as freeholds; for her interest would not be affected, seeing that her conveyance, as donee, is considered as the deed of the donor. A power to a woman “being sole,” cannot be executed by her during coverture, though a married woman may execute a power given to her whilst sole, and the husband's concurrence in his wife's appointment is never necessary.

The 1 Vict. c. 26, does not affect a married woman's right to make a will in execution of a power. (§ 8.)

5. An infant may execute a power simply collateral, By infants. deriving its effect from the Statute of Uses, by deed, but not by will in pursuance of 1 Vict. c. 26, § 7.

Upon this section of the Wills' Act, Sir Edward Sugden²⁴ observes :—"In the case of an infant, having a power to appoint personalty by will, marrying and having children, and dying under twenty-one,—a case not of unfrequent occurrence—the alteration prevents him from providing for his family, and the property, contrary to the intention of the donor, may go over to a third person, who was intended to take only in case there was no will of the infant."

6. This branch of our subject, so far as it relates to the circumstances required in the execution of powers, may be The mode of executing a power. ranged under two distinct heads; namely *external* and *instrumental* circumstances.

External circumstances are such as have their existence *dehors* the instrument by which the power is executed, and are collateral to it; as in cases where powers of revocation are limited, to take effect upon tender of money, &c.

Instrumental circumstances are those which immediately relate to, or are required to appear upon the face of the instrument itself by which the power is executed, as writing, sealing, witnessing, &c.

With respect to circumstances, whether external or internal, the rule, both in law and equity, is, that all *incidental* circumstances prescribed in the creation of powers as to *consent of third persons, subscription of the instrument, witnesses, &c.* must be *strictly* observed.

And the *rule* is the same, although the power be reserved

to be executed by the owner of the estate subjected thereto.²⁵

In the execution of a power, deriving its effect from the Statute of Uses, it is necessary to appoint immediately to the person intended to take the legal estate, for a power is a mere right to limit a use; thus, if an estate be appointed to A, to the use of B, A would have the use arising under the original seisin, and consequently the legal estate, and B would enjoy the equitable trust.

If the power be given by will, without a seisin to serve the estates to be created, it is a mere common-law authority;²⁶ an appointment, therefore, by virtue of such a power, to A to uses would not of itself vest the legal estate in A, but would give it to the real objects of the appointment.

A properly drawn deed of appointment provides for these three things:—(1) that the deed executing the power is expressly in exercise of it, for this clearly shows the donee's intent;²⁷ (2) and of every other authority enabling the

(25) Powell on Powers, p. 129.

(26) The distinction between common-law authorities and powers under the statute is this:—Under a power of the latter description, an appointment to A, to the use of B, gives A the use or legal estate, and B a mere trust; but under a similar appointment in exercise of a common-law authority, B takes the use which the statute immediately executes, and A retains nothing.

(27) It is a clear rule of law on the execution of a power, that the execution must have a *reference* to the *power itself*; and that a person claiming under the execution takes under the deed by which the power is created; and therefore that the *uses* limited by the power must be such as would have been good if limited by the original deed; for, *every execution* of a power must be *coupled* with the *power itself*, so that those who claim under the execution *must derive their title from the power*.

In the case of *The Duke of Marlborough* against *Lord Godolphin*, in Canc. Tr. 33 Geo. II. there was a clause inserted in the will, that certain trustees and their heirs, on the birth of each son of the tenants for life, should revoke the uses limited in tail-male, and limit the premises to them for life, with remainder to their sons in tail-male. Lord *Northington* there said, "This is a clause so new as not to have acquired a name. It is a wonder that it should be a question in a court of equity, which is a jurisdiction of reason, whether, though the Duke of Marlborough could not lock up his property in this manner himself, yet might he not deliver up the keys to another, and empower

donee in that behalf, in order to guard against a misrecital of the power, and (3) that the formalities required to the execution of the power are complied with, thus furnishing internal evidence of the ceremonies having been properly observed.²⁸

When the donee has both a power and an interest, it is the practice for him, first to exercise the power and limit the estate to the uses afterwards declared; and, then, by a second *testatum*, to convey the estate to the intended uses.

An appointment passes only the donor's interest, and not any interest of the donee. Where a fund, subject to a power, is vested in a trustee, notice of the execution of the power should be served upon him.²⁹

7. In the absence of any special direction or condition, any words, either in a deed or will, indicating the intent to exercise the power, will be sufficient for the purpose; and in such a case, it has been said that a simple note in writing, unattested, would be a good execution of a power.³⁰

By what words.

him to do it; that is to say, in other words, *non potest facere per se, sed potest per alium; non per directum sed per obliquum*. If these innovating modifications are to be allowed, as the law is a system of wisdom, it would allow it by direct limitation, but to say this cannot be done by direct limitation, and yet to say that the thing may be done, by I know not what magic, would make it a system of puerility and jargon."—*Powell on Powers*, p. 339.

(28) It is not necessary that, where a power to appoint is reserved, the deed creating the power should be recited or referred to in the instrument by which it is executed, if the act done be of such a nature as that it can have no operation, unless by virtue of the power; for, in such case, the law will refer to that, and thereby give validity to the instrument.

But although a man may execute a power of appointment or revocation, without particularly reciting or referring to the deed creating the power, yet the instrument by which the power is executed must have reference on the face of it to, or mention the estate on which it is to operate: and the want of such reference cannot be supplied by parol.—*Powell on Powers*, pp. 111, 117.

(29) See *Cothay v. Sydenham*, 2 Bro. C. C. p. 391.

(30) *Saunders v. Owen*, 2 Salk. p. 467.

As to the circumstances which should attend the execution of a power.

8. But in most cases, particular circumstances are required to attend the execution of a power.

Every condition set forth must be strictly complied with, otherwise there would be a palpable and direct opposition to the agreement, as well as a taking away from a person those restrictions, albeit perfectly arbitrary, which he has lawfully thrown about the execution of the power, in order probably to protect himself, and perhaps others interested in the property, from fraud.

But the Wills' Act, 1 Vict. c. 26, § 9 enacts:—"That no will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

"That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." (§ 10.)

If a deed be expressly required, the power cannot be executed by will; and so, if a will be expressly required, the power cannot be executed by any act to take effect during the donee's life. A power to appoint by will "or otherwise," authorizes an appointment by deed. Where a power is to be executed by *the will*, or *last will and testament* of the donee, an instrument, although stamped, sealed, and delivered as a deed, will, if testamentary in its

nature, and complying with the requisites of the 1 Vict. c. 26, be a good execution of the power. Where, in the document creating the power, general words are used, as "writing," or "instrument," the courts will take advantage of them in favor of the intention, and deem a will within the meaning of the power, although in ordinary acceptation, the words indicate a deed.

Where the deed is required to be "duly" attested, an attestation by one witness will satisfy the words. When the deed executing the power is required to be *attested* by witnesses, the attestation-clause should set forth that the deed was signed, sealed, and delivered in the presence of the attesting witnesses.

Mr. Preston's Act, 54 Geo. III. c. 168, passed the 30th July, 1814, enacts that:—

Every deed or other instrument *already made* with the intention to exercise any power, authority or trust, shall be of the same validity and effect as if a memorandum of attestation of signature had been subscribed by the witness or witnesses thereto, and that the attestation of the witness or witnesses thereto, expressing the fact of sealing and delivery, without expressing the fact of signing, or any other form of attestation, shall not exclude the proof or the presumption of signature.

This act is only retrospective, and does not apply to the future exercise of powers.

Every formality required to the execution of the power must be perfected in the donee's life-time, although it be external and *dehors* the deed, as, attestation, enrolment, &c.

If any person's consent is required, the condition must be strictly complied with, and if the person die before the execution of the power without having consented, the power is gone; so, where the consent of several persons is required, the death of one of them destroys the power, unless it be provided that the survivors or survivor of them may consent.

The rule of stating precisely in the deed or will executing the power, that every circumstance and condition have been observed and performed, ought never to be departed from.

The donee has all his life-time, in which to execute a power, where it is general in its terms, and he may execute it at different times and not to the utmost extent at once, unless confined or otherwise provided against.³¹

It is a general rule that a power badly executed may be re-executed in a valid manner. A donee may execute the power, without referring to it at all, but his intent to execute it must clearly appear. If a donee have two general powers over the same estate with different circumstances, and do an act without referring to the circumstances which may be valid as an exercise of one of them, it will be deemed an execution of that power which will support the disposition.³²

Where a person has an interest as well as a power, and does an act generally as owner of the land, without reference to his power, the land will pass by virtue of his ownership.³³ But if the act be in part inoperative, then the power is exercised, *ex. gra.* if an estate be settled to such uses as A shall appoint, and in default of appointment as to part to himself, and as to the residue to strangers, and he make a general disposition, the instrument will operate as an execution of the power, inasmuch as the words of the instrument could not otherwise be satisfied.³⁴ A general act executes a power of revocation, where the

(31) Powers of revocation may be executed at different times, over different parts of the estate upon which they attach; and the law is the same as to powers of appointment. They may also be executed at different times, over different parts of the premises subjected thereto.—Powell on Powers, p. 340.

(32) *Udal v. Udal*, Al. 81, and see 1 Vict. c. 26, § 27, *ante* p. 430. It is to be observed that only general powers are within this act, which does not apply to particular powers.

(33) 1 Sugd. Pow. c. vi. § viii. p. 412.

(34) *Ib.* p. 413.

donee has only a partial interest. And where the disposition, however general it may be, will be absolutely void if it do not enure as an execution of the power, effect will be given to it by that construction.³⁵ If a married woman have a power, and an estate in default of appointment, and she dispose of the estate, without reference to the power, it will operate as an execution of the power, because otherwise it would fail altogether. So where one has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time, if it be fed out of his interest, it shall take effect by force of the power;³⁶ and this, although the donee mistake his title, and recite that he was seised in fee, and conveyed as owner. Where it can be inferred that the power was not meant to be executed, the court cannot so consider it. The discovery of what is intended is often a matter of extreme difficulty.

A donee may annex conditions to the execution of the power. A very usual qualification is a power to revoke and limit new uses, which are separate powers. Lord C. J. Bridgeman³⁷ observed, that a power of revocation is to some purposes construed as a condition, for it reduces an estate back to him to whom it was at first limited; but to some purposes it is construed as a limitation, for a part may be revoked at one time, and a part at another. And if it be accompanied with a power to declare new uses (as most commonly such powers are), it varies more from the nature of a condition, for it revests not the estate to the party from whom it moved, as a condition does, but vests it in others; and if it do return to him who revoked it, yet it returns to him in another manner,—he is not in of the old estate, as in case of a condition, but he may be, as the case requires, in of the old use.

(35) *Sir Edward Clere's case*, 6 Rep. 17 b.

(36) See the cases discussed, 1 Sugd. Pow. p. 418, *et seq.*

(37) Bridg. by Ban. pp. 112, 118, 119.

If a particular power is given to two persons, or the survivor of them, with or without power of revocation, they may execute a joint appointment, and reserve a power to the survivor to revoke and appoint again.³⁸ Which powers need not be reserved with the same solemnities as were required by the first power: unless perhaps where the first power is a limited one.

Sir Edward Sugden³⁹ deduces from the cases the following four propositions as to deeds, (and the like observations apply to other instruments *inter vivos*) executing powers:—

(1.) That in a deed *executing* a power, a power of revocation and new appointment may be reserved, although not expressly authorized by the deed *creating* the power. And that such powers may be reserved *toties quoties*.

(2.) That where an appointment under a power is made by deed, it cannot be revoked unless an express power be reserved in the deed by which the power is executed: a revocation will not be authorized by a general prospective power in the deed creating the first power.

(3.) That although in the *original* settlement a power of revocation only is reserved, yet a power to limit new uses is implied, and may be executed accordingly, unless a contrary intention can be collected from the whole settlement, or the estate is expressly limited to other uses, but

(4.) That every power reserved in a deed *executing* a power will be strictly construed, and therefore a mere power of revocation in such a deed will not authorize a limitation of new uses, although in certain cases the original power may be re-executed.

Of powers to
appoint new
trustees.

9. A provision for the appointment of new trustees under

(38) *Brudenell v. Elwes*, 7 Ves. jun. p. 332.

(39) 1 Powers, c. vi. § ix. p. 461.

various circumstances,⁴⁰ is generally inserted in settlements, since in the absence of it, an application must be made for the purpose to the Court of Chancery, to obtain an order under the provisions of 13 & 14 Vict. c. 60. The power to appoint new trustees is held to be a proper and reasonable power.⁴¹

(40) As death, desire to be discharged from the trust, refusing or declining to act, incapacity of any trustee, or where he is going abroad, or has become insolvent.

(41) *Lindow v. Fleetwood*, 6 Sim. p. 152.

CHAPTER IV.

WHAT ESTATES MAY BE CREATED UNDER A POWER OF APPOINTMENT.

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|-------------------------------|----------------------------------|
| 1. To what persons. | 4. Formal words. |
| 2. Extent of a general power. | 5. Exclusive powers. |
| 3. The acts authorised. | 6. The Illusory Appointment Act. |

To what persons.

1. AN unborn son may be made a tenant for life, and a vested remainder may be limited thereon to a person *in esse*; but there cannot be a limitation to the children of the unborn tenant for life as purchasers, for that would be a possibility upon a possibility, and tend to a perpetuity, which the law discountenances. An estate, however, may be settled on a child *in ventre matris* for life, with remainder to his sons as purchasers, since such a child is considered as a life in being.⁴²

A power to appoint to relations, or to near relations, without specifying them, includes those capable of taking within the Statutes of Distribution.⁴³

Under a power to appoint to children, an appointment

(42) But although an estate limited under due execution of a power to the issue of a child unborn at the time of the creation of the power, as purchasers, would be bad, yet there cannot be any objection to the validity of a limitation for life to a person not *in esse*. Such limitations have been admitted and recognised in several adjudged cases. Vide *Lovelace's case*, Saville's Rep. 75. 2 Leon. 35 pl. 48. 8 Vin. Abr. 239. pl. 3. *Denn. on dem. Breddon v. Page*, 3 Durnf. and East Term Rep. 87. in note. *Hay and the Earl of Coventry*, *ibid.* 83. It is the limitation over of the remainder in tail to the issue of such unborn person as purchasers, that is repugnant to the rule of law on the execution of a power, relied on by Mr. Justice Buller in the case of *Robinson v. Hardcastle*,—2 Durnf. and East Term Rep. 241.

(43) 22 and 23 Car. II. c. 10, and 29 Car. II. c. 30.

to grandchildren will not be good.⁴⁴ Where a child dies, without any appointment having been made to him, no part can be appointed to his executors or administrators,⁴⁵ and if he die before the age at which the portion becomes payable, it will sink into the estate. A valid appointment, however, may be made to persons not objects of the power, with the approbation of the real object of the appointment, and such a transaction will be upheld in equity. A power to appoint to children living at their parent's death, includes a child *en ventre sa mere* at that time, for such a child is deemed *in esse* for such purpose. A younger son becoming the eldest or only son before he receives his portion, loses it, for he then takes the estate provided for the eldest deceased son; but if such a child change his character after the receipt of the money, he cannot be called upon to refund the portion.

A power to appoint to nephews does not extend to great nephews.

2. A general power is tantamount to a limitation in fee, and the donee may create whatever estates he pleases, as though he were seised in fee, such estates to commence from the time of the *execution* of the power; but, a particular power does not authorize any estate to be created, which would not have been valid, if limited in the deed *creating* the power. If the power be created by deed, it speaks from the execution of it; if by will, from the testator's death.

Under a general power, a fee may pass, although no words of inheritance are used; *ex. gra.* under a power to sell, the donee may sell the inheritance; so a devise to a wife in fee absolutely and at her own disposal, authorizes her to dispose of the fee; a general power to dispose of an estate in favour of a particular object, will authorize a limi-

(44) *Brudenell v. Elwes*, 7 Ves. 382.

(45) *Maddison v. Andrews*, 1 Ves. 57.

tation in fee, although no words of inheritance are contained in the power; so if the words are "in such manner and form."

Where there is a limitation which would, standing by itself, vest an estate tail in the person whose issue is to take, it will equally have that operation, although the limitation be to the heirs of the body, in such shares and proportions as he himself should appoint.⁴⁶ An unlimited power to charge an estate will authorize a disposition of the estate itself, in trust to sell and divide the money amongst the objects.⁴⁷ So a power to grant the land enables a charge of a sum of money on the land.⁴⁸ These are *equitable* executions only.

A different species of estate, although less valuable than that mentioned in the instrument creating the power, cannot at law be granted,⁴⁹ although equity will support such an execution; where, however, the nature of the interest is the same, the appointment will be good at law as well as in equity, although the power is not executed to its fullest extent.

If a power expressly require that an estate in fee and "*no other*," shall be appointed, a less estate than a fee cannot be limited. But if a power be to lease for any term or number of years, not exceeding a stated number, a lease may be made for any term within the limit. A power to grant an interest in possession will not authorize a grant in reversion.

Where a power is given to appoint a fund (whether real or personal and of whatever tenure) amongst several objects *in esse* or to be born, and the fund is in default of appointment, given amongst the objects of the power, if there should ultimately be but one object of the power, an in-

(46) *Doe v. Jesson*, 5 Mau. and Sel. 95.

(47) *Long v. Long*, 5 Ves. Jun. 445.

(48) *Roberts v. Dixall*, 2 Eq. Ca. Abr. 668, pl. 19.

(49) Sugden's Powers, vol. i. p. 494.

terest cannot be limited to him under the power, determinable on the happening of a particular event, for the survivor is entitled to the whole estate.⁵⁰ And where the power simply authorizes an appointment of the shares to be taken by the objects, the power necessarily ceases when there is but one object, for he then takes the whole.⁵¹

3. With regard to what acts a power authorizes, it should be observed, that a power to make partition of an estate will not authorize a sale or exchange of it; and a power of sale simply does not authorize a partition; though under such a power, a partition or an exchange may be *indirectly* effected. It is very doubtful whether a power to exchange will authorise a partition.⁵² A power to appoint an estate, directed to be bought with the money to arise by sale of another estate directed to be sold, may be exercised over the estate directed to be sold in the same manner as it might be over the estate directed to be purchased.⁵³ A power to sell and raise a sum authorizes a mortgage, unless the intent be a sale only; and a power to raise a sum out of an estate enables a sale of it. A power to charge a given sum upon an estate, without pointing out any portion or part of it, will authorize the charge to be made upon any portion of it. The intention of the parties must be the guide as to the extent of the power.

4. Technical expressions are necessary in limiting estates by deed or any act *inter vivos* under powers; therefore if the estate be limited to A merely, A will take for life only; a greater latitude, however, is allowed in wills executing powers, and they are construed by the courts as proper wills.

Where exclusive powers are given, the proper phraseo-

(50) Sugden's Powers, vol. i. p. 500.

(51) *Folkes v. Western*, 9 Ves. jun. 456.

(52) 2 Sug. Pow. 281.

(53) *Bullock v. Fladgate*, 1 Vea. and B. 471.

logy is—"To all and every, or such one or more exclusively of the other or others" of the objects, as the donee shall appoint. Where the power is to appoint to children of a marriage, or their issue, it may run thus, providing for every event—"To all and every, or such one or more exclusively of the other or others of the children, *or* to all and every, or such one or more exclusively of the other or others of the issue of the children, *or both* to all and every, or such one or more exclusively of the other or others of the children; *and* to all and every or such one or more exclusively of the other or others of the issue" as the donee shall appoint.

Exclusive powers.

5. An exclusive power is not authorized under a power to appoint "to all and every the child and children" or "unto and among several objects" or "unto and amongst such children begotten between us and in such proportion" as the wife shall appoint; or "amongst the children as the donee shall think proper" or "upon trust and confidence that she (the wife) would not dispose thereof but for the benefit of her children." In these cases every object must have a share.

But powers to appoint "to such of my children as my wife shall think fit;" or "to one or more of my children as my wife shall think fit" or "to be at my wife's disposal, provided it be to any of my children" or "amongst all or such of my children" or "to and amongst such of my relations as shall be living at the time of my decease, in such parts, shares and proportions" or "unto and amongst all such child or children of A, in such parts, shares and proportions as B should choose," enable the donees to appoint exclusively to any of the appointees.⁵⁴

Where the intent is to create an exclusive power, it will be sustained, although no words of exclusion are expressly used.

(54) 1 Sugd. Pow. c. vii. § 5.

6. It is proper here to introduce the 1 Wm. IV. c. 46, ^{The Illusory Appointment Act.} entitled, “An Act to alter and amend the Law relating to Illusory Appointments.”

It recites as follows:—

“Whereas by deeds, wills and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property: And whereas appointments in exercise of such powers whereby an unsubstantial, illusory or nominal share of the property affected thereby is appointed to or left unappointed to devolve upon any one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding at law: And whereas considerable inconvenience hath arisen from the rule of equity relative to such appointments, and it is expedient that such appointments should be as valid in equity as at law.”

And then enacts:—

“That no appointment which, from and after the passing of this act [16th July, 1830] shall be made, in exercise of any power or authority, to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory or nominal share of the property subjected to such power.”—(§ 1.)

But it provides:—

“That, nothing in this act contained shall prejudice or affect any provision in any deed, will or other instrument

creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded.”—(§ 2.)

And further declares:—

“That, nothing in this act contained shall be construed, deemed or taken, at law or in equity, to give any other validity, force or effect to any appointment than such appointment would have had if a substantial share of the property effected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power.”—(§ 3.)

CHAPTER V.

THE EFFECT OF THE CREATION AND EXECUTION OF POWERS,
AND AS TO EXCESSIVE POWERS.

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| 1. Effect upon estates.
2. Operation of the instrument executing the power.
3. How estates under powers arise.
4. The effect of the execution of a power on the estates in the set- | tlement.
5. Priority of powers.
6. Excessive executions.
7. The avoidance of powers by statute. |
|--|--|

1. WHEN a power is void, the estates limited in the instrument creating the power cannot be affected by it; they will take effect as if no power had been given. Estates actually limited in a settlement, with a power of revocation, are vested, subject to be revoked or defeated by the exercise of the power; and so, estates limited in default of a preceding power of appointment being exercised, are vested; but subject to be divested by the carrying out of the power; and it does not make any difference, though the property be personal.

2. The instrument (whatever it be) executing the power, operates as a declaration or appointment of the use. A will made in execution of a power, not only operates as an execution of such power, but also has the qualities and nature of an ordinary will, and the will of a married woman made in execution of a power, which could be executed by will only, will not be revoked by a deed executed during the coverture, and after her will manifesting a different intention.

How estates
under powers
arise.

3. The general rule is, that estates limited by the execution of a power take effect as if they were created by the deed raising the power, but only from the time the power is executed.

A person claiming under an appointment, although he claim in one sense by the act of the donee of the power, still in a direct sense does not derive his title through or under the donee, as a grantee in a conveyance of an estate or interest does through or under the grantor; the appointee claims through or under the creator of the power; he is *in*, as it is technically termed, under the instrument by which the power is created; the limitation of the estate or interest appointed is, for many purposes, deemed to be a limitation of the original instrument. That this is the case is proved by a variety of authorities, ancient and modern; indeed the whole system of powers depends on this doctrine.⁵⁵

In the case of a power of appointment reserved to the original settlor, the case may be somewhat different; but here the claim is by virtue of the settlement, and consequently the appointee is *in* under the donee of the power; but still of the donee's original or former act, namely, the settlement.

It is on this principle that instruments of appointment need not pursue the forms, or be attended with the formalities, of ordinary conveyances and assurances; that *femmes covert* can appoint to their husbands, or otherwise execute powers; that husbands may again appoint to their wives, and that infants may execute powers.

From this principle, and from the circumstance that an appointment by virtue of a power deriving its effect under the Statute of Uses, operates so as to fix or attach a use upon the original seisin, it follows that an appointee be-

(55) See the subject fully discussed in *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 61.

comes a *cestui que use*; and since, as is well known, a use cannot be limited on a use, the ulterior limitations, if any, founded on the use in the appointee, cannot prevail except in equity.⁵⁶

The general rule is, that a limitation created under a power will overreach all the other limitations actually existing, unless either it be otherwise expressly provided, or a contrary intention must necessarily prevail or can be collected. In the nature of things, a power must, on its exercise, supersede some interest or other; and the difficulty is in confining the operation of the power, so as to make it supersede one limitation and not another.⁵⁷

4. As to a power of revocation, its exercise determines previous uses, without entry or claim, if the party, who has the power, is himself tenant of the freehold, as he cannot enter upon himself, and a claim is unnecessary; but it has been doubted, whether a claim is not necessary, where the revoker has no interest in the land.⁵⁸

The effect of the execution of a power on the estates in the settlement.

But as to a power of appointment, with a limitation over in default of appointment, it is plain that upon its execution, the estates limited in default thereof, cease and are defeated, while the estates limited by it, take effect from the time of such execution.

(56) 2 Chance on Powers, c. xii. § 1. As to powers existing independently of the Statute of Uses, the case appears to be different. See *ante*, p. 438, note (26).

(57) Cases are of course excluded, where in form the power is limited by way of remainder,—as, for example, where an estate is limited to one for life, and *after his decease*, to such uses as he shall appoint, and in default of an appointment over.—2 Chance, p. 9.

(58) 2 Sug. Pow. 30. The doubts expressed on powers of revocation, appear to have been on account of their supposed resemblance to conditions; it is apprehended, however, that no entry or consequently claim, can be necessary in any case, in order to vest the estate or interest in the party who, on the execution of the power, is entitled under the substituted uses or under the original estate,—that is, no strict legal entry or claim as in some cases with respect to a condition; of course, the party entitled on the execution of a power must in some way or other assume a dominion over the property, otherwise in time his interests may be barred.—2 Chance, c. xii. § 11, p. 31.

And as to particular powers in a settlement: powers of sale and exchange defeat all estates and interests, except otherwise expressly intended, and except leases already subsisting under powers in the settlement, and transfers them to the property purchased or exchanged. Partition depends upon the same principles as a sale or an exchange. A power to make leases to take effect in possession will control and overreach all the powers and estates in the settlement, to the extent of the interests comprised in such leases. And so, jointures supersede all the estates, which would prevent the widow from taking the jointure upon her husband's decease; for powers to jointure, like powers to lease, take precedence of all the estates in the settlement, unless it be otherwise provided by the instrument creating the power. Powers to raise portions take precedence of other estates in settlements, when they are not restricted by other powers in the same instrument, but whether they will displace a jointure is a doubtful point. A power to charge an estate with a sum of money, unless expressly confined, overreaches all the limitations.

Priority of
powers.

5. Where there are two or more powers given by the same deed and nothing is said touching their priorities, the construction will depend upon the scope and intent of the settlement.

Upon the question of the priority of powers, Mr. Sanders has, in his *Essay on Uses and Trusts*,⁵⁹ these remarks:—

“ So early as the time of Bridgeman's practice, a doubt seems to have prevailed as to the priority and effect of powers of the above kind with reference to each other, when contained in the same settlement; and he therefore introduced a clause in settlements, declaring, ‘ that every of the said jointures, leases, grants, limitations, and estates, shall take effect and stand good, according as the said jointures, leases, grants, limitations, and estates, shall

(59) Vol. i. p. 173, *et seq.*

in priority of time be made, one before the other, by force of any of the powers or provisoes aforesaid.

“The qualification, however, so far as I have been able to ascertain, appears to have been subsequently omitted in most approved forms; thereby leaving the effect of the powers to the construction of law; but of late years it has not been unusual to insert a proviso, declaring, 1st, that the power of leasing shall take precedence of the power of selling and exchanging, unless executed subsequently to it, in point of time; 2dly, that the power of selling and exchanging shall overreach every other power, although subsequently exercised in point of time; and 3dly, that in all other cases, the powers shall take effect according to the exercise of them in priority of time.

“Considering the nature and objects of powers of leasing, jointuring, charging for younger children’s portions, and selling and exchanging, I cannot satisfactorily discover the necessity or propriety of any explanatory declaration as to their priority; and it is to be feared that these clauses have tended to create doubts where none ought to have existed, and even to raise an erroneous opinion as to the effect of appointments made under the powers; for certainly it cannot be considered as an invariable rule, that, in the absence of an express declaration, the uses to arise under the execution of the powers will take effect according to the priority of execution.

“Admitting the propriety of expressly declaring the intention of the parties, both of the qualifications which I have above noticed are imperfect and erroneous. The following plan seems less objectionable: in the power of sale, the releasees, or the tenant for life, may be empowered to revoke the uses limited by the settlement, and which may be limited by the exercise of any of the powers therein contained, except any lease made under the power of leasing, and subject and without prejudice to any sale or mortgage which shall then have been actually made in consequence

of the exercise of any of the powers; and in the power authorising the tenant for life to charge for younger children's portions, it should be expressly stated, that the charge made under the power should be subject to the jointure limited by virtue of the power of jointuring reserved to the same tenant."

It has however been the practice to leave it to the law to declare how the appointments under the powers should operate.

Excessive
powers.

6. An excessive execution of a power arises under a variety of circumstances :--⁶⁰

1st. With regard to the beneficiaries of a power; thus,

(60) In questions upon the execution of powers, courts of equity will, if the power be *exceeded*, correct the excess, and uphold the execution thereof, *so far as the power warrants*.

Excesses in the execution of powers may arise either, (1) in respect to the *thing* subjected to the power, or (2) to the *extent* of the estate to be created by the power, or (3) to the *quality* and *property* of such estate, or (4) to the *persons* in whose favour the power is to be executed.

And courts of law have, in modern times, adopted the same rule of construction of instruments made in execution of powers *in this respect*, as obtains in courts of equity, *by correcting* the excess, and *supporting* the execution of the power *so far* as is warranted thereby.

It has been already observed, that excesses in the execution of powers may be either by the appointment of a larger *interest* in, or *portion* of that which is the subject-matter on which the power operates than is warranted thereby, or by appointment to *persons*, not objects of the power, of part of the interest in, or of part of the thing itself that is the subject of the power, or by annexing qualities and properties, *not required by the power*, to the interest or estate appointed under it; we have likewise seen, that in these cases the execution is *uniformly good as far* as it is warranted by the power; but the consequences of this doctrine, as to that interest, or part, in which the power is exceeded, will be various, according to the circumstances of the case. Thus if the appointment exceed in nominating persons to take part of the interest in, or portion of that which is the subject-matter of the power to whom the power doth not extend, the appointment, *so far* as their interest therein goes, will be utterly void, and the subject-matter on which the power was intended to operate go as if unappointed.

But if the appointment under a power exceed the power by any qualification being added to the whole or a part of the interest in the estate appointed, which the power does not warrant, in such case the appointment will not be

an appointment may be made to objects of the power and to strangers, and either together as a class, or in remainder or expectancy one after another.

The legal rule, that where a testator has two objects, one particular, and the other general, and the particular intent cannot be effected, unless at the expense of the general intent, the latter shall be carried into effect, notwithstanding the former⁶¹ applies to powers, exercised by will. Under a power, then, to appoint to children, an appointment to a child for life, remainder to his children, who are incapable of taking, gives the child himself an estate tail, provided it will clearly carry out the general intent.⁶² This doctrine of *cy pres*, however, is confined to powers exercised by will, and in relation to realty only.

Should a partial interest be given to an object of the power, with remainders to persons not objects of it, where *cy pres* is inapplicable, yet only that part of the power, which is unauthorized, will be void. But a gift under a power, embracing objects not within the line of perpetuity, is wholly void, and the fund cannot be given to those, to whom it might have been legally appointed; yet where the fund is given amongst several objects, some of whom cannot take, and the excess can be ascertained, the objects who are capable may in most cases take their shares. If a fund should be given between the parent capable, and his children incapable, in equal moieties, it seems clear that the parent would be entitled to his moiety; so if the fund were given equally amongst the objects of the power, and

void as to such part in which the excess is, but the excess only will be void, and the appointment, as to that part, as well as to the rest, will be good.

The ground and principle of these decisions is, that where there is a complete execution of a power, and something *ex abundanti* added, which is not warranted, there, if the excess be distinguishable, so that the Court can draw the boundary, the execution will be good, and only the excess void: but where the boundaries between the excess and the execution are not distinguishable, the execution will be void for the whole.—Powell on Powers, pp. 344—359.

(61) This indeed is the principle involved in the doctrine of *cy pres*.

(62) See the question discussed, 2 Sug. Pow. p. 57 *et seq.*

strangers living and ascertained, there appears to be no solid principle upon which the real objects could be refused the shares, to which they would have been entitled upon a division, if the whole appointment had been valid.

Although a limitation be void, as not authorized by the power, yet it is not considered absolutely void, so as to accelerate the remainder dependent upon it, which, if given immediately, would have been good; but notwithstanding that it be void itself, yet it prevents the limitations over from taking effect.⁶³

But in a case,⁶⁴ where the fund was given to a son who was an object of the power, and was alive at the time it was created, for life, and after his decease, to his wife and children, who were not objects; *but in case he should die without leaving a wife or child him surviving*, then to his sister, who was an object of the power; the trusts for the wife and children were determined by Lord Alvanley to be bad; but he at the same time held, that if the son should die, without leaving a wife or child surviving, the gift over to the daughter would be good.

2nd. With regard to the quantity of the estate appointed.

If under a power to lease for twenty-one years, a lease for twenty-six be made, it is only void for the excess, and good in equity *pro tanto*, (although void at law), for the power itself has been completely executed. Where, however, the power is not fully exercised, and the boundaries between the excess and the execution are not distinguishable, it will be wholly bad. Where a distinct limitation is superadded to a valid prior appointment, it will be merely void even at law, and treated as surplusage, without affecting the previous properly-appointed estate; but if the two limitations make one estate, then at law it is altogether void, though only in equity, *quoad* the excess.

It seems probable, that the courts of law will at this day

(63) 2 Sug. Pow. 67.

(64) *Crompe v. Barrow*, 4 Ves. 681. (1779.)

hold an appointment to be good *pro tanto*, wherever the case from its nature will admit of it without inconvenience, unless there be prior decisions, or a course of *dicta*, equivalent to decisions, of a directly contrary tendency. Where a party has an interest, and professes to convey an estate more extensive than the interest which he has, the actual interest will, as is well known, pass, provided the assurance be adapted to convey it, and that although the qualities of the actual interest, and of the interest professed to be passed, vary; and there seems to be much weight in Lord *Mansfield's*⁶⁵ reasoning, for adopting a like rule with reference to the execution of powers, at least in a great variety of cases, where the settlor's intention would not be defeated.

3d. With regard to conditions annexed to the estate, if they are unauthorized, they are treated as nugatory, and have no effect upon the transaction; for a valid appointment will be sustained, although confounded in the same instrument with other subjects not relating to it.⁶⁶

7. The purpose of the Act of Parliament 27 Eliz. c. 4, is to render an assurance, containing a chance of revocation reserved to the settlor, void as against a subsequent purchaser,⁶⁷ for by its fifth section, it enacts:—"If any

The avoidance of powers by statute.

(65) *Zouch d. Woolston v. Woolston*, 2 Burr. 1146.

(66) Where a limitation of an estate under a power exceeds the extent warranted thereby, the appointment is void as to so much of the limitation as exceeds the power, and can never come in esse; but it not only is void itself in that extent, but although it fails to exist for want of persons to take under it, yet it renders void any subsequent limitation grafted thereon, although limited pursuant to the power: for every instrument is to be construed as taking effect at the moment of execution, and no subsequent event can influence the construction of it one way or another.

And as the execution of a power will be good, though it exceed in some circumstances, if that which is authorised thereby can be distinguished from that which is not authorised thereby; so the execution of a power will be good, though it limit a less estate in that which is the subject of it than is warranted by the power.—Powell on Powers, p. 361.

(67) See 2 Sug. Pow. c. xii.; and 2 Chance's Powers, c. xv. § 5. p. 162 et seq.

person or persons shall make any conveyance, gift, grant, demise, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article or condition of revocation, determination, or alteration, *at his or their will or pleasure*, of such conveyance, assurance, grants, limitations of uses, or estates, of, in, or out of the said lands, tenements or hereditaments, or of, in, or out of any part or parcel of them, contained or mentioned in any writing, deed or indenture, of such assurance, conveyance, grant or gift; and after such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall demise, grant or charge the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration, paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them, in and by the said *secret* conveyance, assurance, gift or grant), that then the said former conveyance, assurance, gift, demise and grant, as touching the said lands, tenements or hereditaments, so after bargained, sold, conveyed, demised or charged against the said bargainees, vendees, lessees, grantees and every of them, their heirs, successors, executors, administrators and assigns, and against all and every person and persons which have, shall or may lawfully claim, any thing by, from or under them, or any of them shall be deemed, taken and adjudged to be void, frustrate and of none effect, by virtue and force of the act; provided nevertheless, that no lawful mortgage to be made *bonâ fide* and without fraud or covin, upon good consideration, shall be impeached or impaired by force of the act, but shall stand in the like force and effect as the same would have done if the act had never been made."

A purchaser within this act must be a *bonâ fide* one, for a valuable and not merely a good consideration.

The Statute of 13 *Eliz.* c. 5, which is especially directed to the relief of creditors, does not, like the Statute of 27 *Eliz.* c. 4, as to purchasers, expressly avoid instruments with provisions of revocation ; but perhaps, in most cases at least, the reservation of a power of revocation would be deemed a badge of fraud, since the settlor thereby in fact retains the ownership of the property. Indeed Lord *Hardwicke* so lays down the law in *Peacock v. Monk*,⁶⁸ when, speaking of “ cases which have been determined without any difficulty,” he says, “ that if there is a power of revocation in such a deed, it is a constant evidence of fraud.” In such a case, the relief would probably be carried farther than in ordinary cases of merely voluntary settlements.

(68) 1 Ves. Sen. 132.

CHAPTER VI.

OF POWERS OF LEASING.

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|----------------------------------|-----------------------------------|
| 1. Object of such powers. | 6. The term which may be granted. |
| 2. Their construction. | 7. The rent to be reserved. |
| 3. Authority of the lessor. | 8. Apportionment statute. |
| 4. Who may be lessee. | 9. Usual conditions. |
| 5. What property may be demised. | 10. The 13 Vict. c. 17. |

Object of
such powers.

1. MR. POWELL thus sketches the causes, which produced these useful and frequent powers:—

“When the mode of conveying estates in that form which we call strict settlement became general, the necessity of inventing some such species of power must soon have been evident to those whose habits led them to the contemplation of this branch of our law: for the inconveniences that must have occurred to a tenant for life for want of it, must have been obvious to every one. Tenant for life without such power had no means of insuring to his lessee any certain interest in his lands, since he could create no estate therein to last beyond the limits of his own life. A tenure so uncertain afforded very little encouragement to induce the farmer to improve, as whatever sum he might expend, the death of his lessor would put an end to his interest, and vest the estate in the remainder-man; who might then reap the fruits of his labour and fortune, either by making him pay a rent in proportion to the additional value arising from the improvements of the lessee, or, on his refusal to comply with those terms, by evicting him and taking in a new tenant. Keeping tenants, therefore, in a situation so fluctuating was equally prejudicial to the interest of the tenant for life and the remainder-man;

for the tenant for life suffered, because no lessee would pay an adequate rent for a lease on which he was afraid to embark his capital, from the apprehension that he might be evicted on the sudden death of his lessor, before he had reaped the advantage of it: and the remainder-man suffered from the estate coming to him in a neglected and unimproved condition.

“To encourage those, therefore, who were skilled in the arts of husbandry, to apply their attention and fortunes in the cultivation and improvement of lands, it became necessary to secure to them a fixed and certain period in the occupation and manurance of them; in order to do which, it was necessary that the tenant for life, under such settlement, should be empowered to secure to his tenants a certain time in their estates in all events; with a view to effect which, leasing powers seem to have been invented. But as the introducing general leasing powers would have been of as great prejudice to the remainder-man on the one hand, by putting him in the power of the tenant for life, as the want of such power was, on the other hand, to the tenant for life and the remainder-man, by discouraging the tenants improving the estate, it therefore became customary in the creation of such powers to restrain the tenant for life to convey only a certain interest upon precise terms, and in a certain manner prescribed by such power. So that as, on the one hand, the power to lease was invented principally for the benefit of the tenant for life, so, on the other hand, the restrictions and limitations of that power were added for the benefit of the remainder-man.”⁶⁹

2. The intent of the parties governs the construction of this as well as every other power, and the rules established as to other powers are applicable hereto: but the restrictive part of such powers ought to be construed strictly ^{Their construction.}

(69) *Powell on Powers*, p. 385, *et seq.*

against the tenant for life, and in favor of the remainder-man; because the circumstances required to attend the execution of such a power are particularly specified with a view to secure his interest, and are shackles placed upon the tenant for life for the benefit of the remainder-man.⁷⁰

Nevertheless, every power in the construction of it, is to be taken with such a restriction, that the estate itself, which is subjected to the power, shall not be destroyed by the exercise of it.

Authority of
the lessor.

3. The lessor must pursue his power strictly, and conform to every condition annexed to such power. It was resolved, in the case of *Lady Gresham*,⁷¹ that if A be tenant for life, the remainder in tail, and A has power to make leases for twenty-one years, rendering the ancient rent, he cannot make a lease by letter of attorney by force of his power; because he has but a particular power to charge the estate of third persons, which is personal to him, and cannot be delegated. The grantor of a lease under a power needs not be in actual possession; but a constructive possession, by the receipt of the rents and profits, is a sufficient compliance with the power: for, if actual possession were necessary, a leasing power could never be executed where the lands are in the hands of a tenant.⁷² If a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of confirmation by the remainder-man; but if the remainder-man accept rent, *as rent*, after the death of the tenant for life, it is an admission that the defendant is his tenant who then becomes entitled to notice to quit.⁷³

Who may be
lessee.

4. The lessee in every such lease must be a person in

(70) *Powell on Powers*, p. 388.

(71) 9 Rep. 76 a.

(72) *Ren d. Hall v. Bulkeley*, 1 Doug. p. 292.

(73) *Doe d. Martin, v. Watts*, 7. T. R. p. 83.

being at the time when it is made; for it is said to have been laid down *per Noy*,⁷⁴ that if a power be to make leases, to one, two, or three persons, the donee of the power cannot make a lease for the life of the first son of J. S., because the person to take under the power ought to be *in esse*.⁷⁵

5. The question—what property may be demised—must depend upon the wording of the power. Sometimes a power in express words extends to the whole of the property; at other times, particular portions, as a capital mansion house, park, &c. are expressly excepted; or the power may, expressly or by inference, be confined to property usually let, or in various other ways.⁷⁶

What property may be demised.

It seems now to be settled, that whether under a power to lease lands and other hereditaments, provided that such rent or more be reserved upon every lease, as hath been reserved or paid for it within a given time previous to the creation of the power, lands not before in lease may be demised, is a question of construction on the intention of the author of the power to be collected from the instrument creating the power or the circumstances of the estate.⁷⁷

If a power in a settlement be limited *indefinitely* to make leases, without mentioning the nature of the interest meant to be demised, it shall be taken *strictly* against the donee of the power; and consequently be intended to authorise only a lease in possession, and not a lease in reversion.⁷⁸

6. A power to lease for lives will not authorize a lease

The term which may be granted.

(74) Raym. p. 163.

(75) *Powell on Powers*, p. 390.

(76) Cases on the words “usually demised,” standing alone and without words of explanation, so rarely occur at this day, that it seems unnecessary to enter into the question,—whether “by analogy to the Enabling Statute” (32 Hen. VIII. c. 28), the courts would, in the absence of controlling words, hold that demises within twenty years of the creation of the power would be sufficient.

(77) *Powell on Powers*, p. 403.

(78) *Ibid.* p. 407.

for years determinable upon lives, but under a general power to lease, with a proviso that the leases should not exceed three lives or twenty-one years, a lease for any term of years determinable upon lives would be good; for a lease for ninety-nine years determinable upon three lives does not exceed three lives, although in truth it is not a lease for lives.⁷⁹ A power to lease for any number of years not exceeding twenty-one years, or for the life or lives of any one, two, or three person or persons, so as no greater estate than for three lives be at any one time in being, authorizes a lease for years or a lease for lives, but not a lease for years determinable on lives. The latter clause was held not to enlarge the first power, which was only to lease for years, not exceeding twenty-one in number.⁸⁰ A power to lease, if in possession, for one, two, or three lives, or for the term of thirty years, or for any other number or term of years, determinable upon one, two, or three lives, or in reversion for one or two lives, or for the term of thirty years, or for any other number or term of years determinable on one or two lives, was held to warrant a lease for thirty years absolutely.⁸¹

A power to demise for three lives or twenty-one years or under, or for any term of years, upon one, two, or three lives, or as tenant in tail in possession might do, was held to warrant a lease for ninety-nine years determinable upon three lives.⁸²

If a power be created to enable a tenant for life to make leases for one, two, or three lives, or for any term or number of years, determinable upon one, two, or three lives, in possession, of such part and parts, and so much only of the manors of the creator of the power, as are then demised or granted *for any such time*, no lands or hereditaments can

(79) *Whitlock's case*, 8 Rep. 69 b.

(80) *Roe v. Prideaux*, 10 East. p. 158.

(81) *Winter v. Loveday*, 1 Com. p. 37.

(82) *Lutwich v. Piggot*, 3 Mod. p. 268.

be demised under such a power, but what are at the time of the execution of the power under lease, for one, two, or three concurrent lives, or for any term of years determinable upon one, two, or three concurrent lives; for the meaning of such restriction is, that the candles shall be all burning at the same time.⁸³

A donee may create a less interest, being *ejusdem generis*, than the power mentions.

If there be a power to make leases *in possession* expressly, which attaches upon an estate, part of which is in possession, and other part thereof in reversion at the creation of the power; the donee of the power may *immediately* make leases *in possession* of the estate in reversion, as well as of that in possession.⁸⁴

But it seems, that if a power enable any one to make leases in reversion, as well as in possession, and some part of the land subject to the power be in possession, and other part of it in reversion, he cannot make a lease in possession, and another lease in reversion, of the same land; but his power to make leases in reversion will be confined to such land as was not *then* in possession. So note the distinction where the power is to lease *in reversion* as well as *in possession*, lands part in reversion and part in possession; and when the power is to lease *in possession* lands part in reversion and part in possession.⁸⁵

A lease may be considered in law as *in reversion*, in several senses, or views of it. In the largest sense of that term, that is said to be a lease in reversion, which has its commencement *at a future day*; and *then* it is opposed to a lease in possession; for every lease that is not a lease in possession, in this sense, is said to be a lease in reversion.

In a more confined sense of the term, it signifies a lease to begin *from* and *after* the *end* of a present interest in

(83) *Powell on Powers*, p. 541.

(84) But see 2 Sug. Pow. p. 354.

(85) *Powell on Powers*, pp. 425, 426.

being, in which sense all leases, where there is a particular estate out, are leases in reversion: and so is the term reversion to be taken, where mention is *generally* made of leases in reversion under a power.⁸⁶

It is a rule, that a general power will not authorize a lease in reversion, but special words must be used for the purpose.

The rent to
be reserved.

7. Powers of leasing most commonly require the best rent to be reserved; or in building leases, the best rent that can be obtained, with reference to the object of the lease; an express clause is usually added, that no fine shall be taken, though this seems to be unnecessary, since it is impossible that the best rent can be obtained, if a fine be paid.

Questions upon this point do not very frequently occur: it is a matter of fact, as to which every case must depend very much on its own circumstances. The word "reasonably" is generally found attached to the word "obtained," but it seems to be implied. Lord *Eldon*⁸⁷ states the principle to be, that the tenant for life must use all due care and diligence to get a fair and reasonable rent; and that if he himself obtain no improper advantage, the presumption is, that he has done that, which his own interest, as well as that of the remainder-man, naturally leads to.

It appears not to be a *decisive* objection to a lease granted under a power requiring the best rent to be obtained, that a higher rent nominally has been offered; the character of the tenant, and all other circumstances, must be taken into account.

Apportion-
ment statute.

8. It is provided (*inter alia*) by the 4 Wm. IV. c. 22, § 2, (which amended the 11 Geo. II. c. 19,) that all rent service reserved by a lease under any power may be apportioned.

(86) *Powell on Powers*, p. 422.

(87) *Queensbery Leases*, 5 Dowl. p. 343.

9. Usually in powers of leasing, besides the reservation of the best rent, it is required, that the lessee covenant for payment of the rent; that a clause be inserted for re-entry in default of payment; that the lessee be not made punishable of waste; and that he execute a counterpart of the lease: if any of these conditions be not complied with, the lease will be void. Usual conditions.

Where the particular terms, under which a power to lease is given to a tenant for life, &c. are prescribed in the power, the terms are in the nature of a condition precedent; and if they are not complied with, the power never arises. In truth, the tenant for life has no power to lease at all, unless the lease be executed in the form prescribed. If it be executed in any other form, it is void in its creation, and the reversioner has a right to take advantage of it.⁸⁸

10. This act repealed the 12 & 13 Vict. c. 26; 12 & 13 Vict. c. 110; and 12 & 13 Vict. c. 26, § 3. It recites that:— The 13 Vict. c. 17.

“Whereas an Act was passed in the last Session of Parliament ‘for granting relief against Defects in Leases made under Powers of Leasing in certain Cases;’ and by another act of the same session, the operation of the first recited Act was suspended, until the first day of June one thousand eight hundred and fifty; and whereas it is expedient, that the said first-recited Act should be amended:”

And enacts:—

“That so much of the said first-recited Act, as enacts that the acceptance of rent, under any such invalid lease as therein mentioned, shall, as against the person accepting the same, be deemed a confirmation of such lease, shall be repealed.” (§ 1.)

It then enacts:—

“That where, upon or before the acceptance of rent

(88) *Powell on Powers*, p. 578.

under such invalid lease, as in the said first-recited Act mentioned, any receipt, memorandum, or note in writing confirming such lease is signed by the person accepting such rent, or some other person by him thereunto lawfully authorised, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease." (§ 2.)

And also :—

"That where, during the continuance of the possession taken under any such invalid lease, as in the said first-recited Act mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators, (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised; and after confirmation and acceptance of confirmation, such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid." (§ 3.)

CHAPTER VII.

OF EQUITABLE RELIEF.

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| 1. As to defective executions.
2. In whose favour, the court will, or will not, relieve.
3. The 3 and 4 Wm. IV. c. 74.
4. As to defects in the instrument.
5. Defective powers of leasing. | 6. When strangers are relieved.
7. Election.
8. Satisfaction.
9. Non-execution.
10. Void powers at law.
11. As to the value of jointure-land. |
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1. IN case a power be defectively executed, equity corrects the defect, and will not suffer the power to be thus rendered nugatory, (as it is at law⁸⁹), provided, however, there

As to defective executions.

(89) We have already seen, [*ante* p. 437] that at law all the conditions and ceremonies of a power must be duly complied with, in order to its effectual execution, and that its terms must be in other respects regarded; in some cases, though there may be no defect as to the instrument, ceremonies, &c. still there may be other fatal defects, as perhaps in the limitation of the estate or interest. We must at once perceive that there may be an attempted and imperfect, or what is usually called, a defective execution of a power. But besides these defective executions, there may be what strictly can in no sense be called an execution,—namely, an agreement to execute; a defective instrument of appointment too, if not at least in some cases including in it such an agreement impliedly, may do so under express covenants for further assurance.

At law both the agreement and the defective instrument of appointment are perfectly nugatory, as to the limiting of any interest in the property embraced by the power, whatever may be their effect as to damages: in equity, however, the case is wholly different, at least in favour of certain classes of objects, and where what are considered the substantial parts of the power have been regarded.

The principle upon which relief proceeds appears to be that adopted by courts of equity, with reference to ordinary agreements and defective assurances. Thus, as to agreements, that which is agreed to be done is to many purposes, and it seems for this, considered done; and in regard to defective assurances, it appears in *Bath v. Mountague*, (3 Ch. Cas. 61) that as the want of livery on a feoffment, or of attornment on a grant, or the want of a surren-

exist a consideration either good or valuable, that the person executing such power have the ability to raise the estate, if the power had been properly carried out, and that the appointee be one or other of the persons favoured by the court.

In whose favour, the court will, or will not, relieve.

2. Now equity will cure defects in the execution of powers in favour of the following persons, in relation to the donee of the power:—a purchaser, mortgagee or lessee; a creditor; wife and legitimate children, for they are deemed creditors by nature; and also charities. But relief will not be extended to husbands, an heir at law as such, natural children,⁹⁰ grandchildren, fathers, mothers, brothers, sisters, nephews, cousins, mere volunteers, or the settlor himself.⁹¹

Equity cannot relieve against the legal consequences of an appointment. So, although there be a meritorious consideration in the appointee, yet if the donee of the power, after a defective execution of it, *legally* execute it in favour of a *bonâ fide* purchaser or mortgagee without notice, the court cannot interfere; for by the last execution the pur-

der with reference to copyholds is supplied, so is the want of formalities in the execution of a power. A like doctrine appears in various other cases; and in one of the cases, *Fothergill v. Fothergill* (2 Freem. 256), it seems to have been thought that there was much more reason for relief with reference to a power, the circumstances being imposed only to prevent surprise.

In a variety of other authorities the relief has been more especially compared to that granted in the case of copyholds; indeed the reference, more particularly in the modern cases, is to that species of defective assurance only: and to it alone Sir E. Sugden refers. It is presumed, however, that the case of defects as to copyholds has been more commonly referred to, on account of questions as to them having been more frequent; and that there is in general no difference between that class of defective assurances and others.—2 Chance's Powers, p. 489 *et seq.*

(90) A natural child is treated as a stranger.

(91) 2 Sug. Pow. pp. 88—100.

When a party has a power of revocation, and executes it defectively, or at least by an act *inter vivos*, with a view to revest the estate in himself, it appears clear that equity will not relieve.—2 Chance's Pow. 499.

chaser obtains the legal estate; and as he has equal equity with the first appointee, he cannot be disturbed. But if, previously to paying his money, or to the execution of the power, he have notice, either express or implied, of the prior appointment, equity will compel him, on the ground of fraud, to convey the estate to the first appointee, so as to make good the defect in the appointment to him.⁹²

3. The Fines and Recoveries Act—3 and 4 Wm. IV. c. The 3 and 4 Wm. IV. c. 74, § 47—excludes the jurisdiction of equity as to cases 74. within that statute, by enacting:—That, “in cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, *the jurisdiction of courts of equity shall be altogether excluded*, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement, which in a court of law would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent of a protector of a settlement, to a disposition of lands under this act by a tenant in tail thereof in equity, shall be of any force, unless such disposition or consent would, in case of an estate-tail at law, be an effectual disposition or consent under this act in a court of law.”

As to defects
in the instru-
ment.

4. Wherever a power is attempted to be created by a defective instrument, then, if there be a sufficient consideration to support the instrument, equity will relieve.

Where a will has been used, instead of a deed, equity grants relief.⁹³

The validity of an appointment by will, as far as regards execution and attestation, depends upon the Statute of Wills, and equity cannot interfere.⁹⁴

The want of a seal, or of witnesses, or of a regular attestation to a deed, will be supplied in equity.

Defective
powers of
leasing.

5. It is doubtful, whether equity can aid the defective execution of a power of leasing.

A power of leasing to a tenant in tail, under the enabling statute of 32 Hen. VIII. c. 28, must pursue the requisites of this statute, otherwise it is bad altogether, and equity cannot interfere, for *equitas sequitur legem*. Indeed, where an enabling or restraining statute creates, or puts a limit upon, a power, or with a view to perpetuate an estate in a particular descent, from public policy, relaxes the law of perpetuity, and gives powers to persons for ever in succession; such cases do not fall within the jurisdiction of equity, but wholly depend upon the law that created them.⁹⁵

The question, whether equity will relieve against a defective execution of the usual power of leasing in settlements, Sir E. Sugden⁹⁶ answers thus:—"Where there is no fraud on the remainder-man, as where the former lease is abandoned, though not actually surrendered, or there is

(93) *Tollet v. Tollet*, 2 P. W. 489, Mose. 46; *Sneed v. Sneed*, Amb. 64; Sug. 336, n.; S. C. cit. 1 Cowp. 264, 265, in *Earl of Darlington v. Pulteney*; see 3 Ch. Ca. 106, in *Bath v. Mountague*.

(94) 1 Vict. c. 26. § 10, quoted at page 440, *ante*.

(95) 2 Sug. Pow. 132.

(96) See the cases 2 Sug. Pow. p. 132 *et seq.*; and 2 Chance's Powers, pp. 525--545.

merely a defect in the mode of the execution of the power; for example, only one witness where two were required, or a seal be wanting, or the like; in all these cases it should seem that if the lessee *is in the nature of a purchaser*, equity will relieve against the defective execution of a power; but where the best rent is not reserved, or a fine is paid contrary to the terms of the power, or the lease substantially commences *in futuro*, or the interest of the remainder-man is, in other respects, invaded, there it seems clear that equity cannot relieve: nor in these cases can any line be well drawn as to the *quantum* of excess or defect in the execution of the power. Therefore, a lease to commence the day after the date of the deed, would be equally bad with a lease to commence at fifty years from the date."

6. Equity will, however, relieve a stranger, in the absence of all meritorious consideration, against the defective execution of a power, occasioned by fraud, by surprise, by intervention, by accident, or disability. When strangers are relieved.

7. There is little in the equitable doctrine of election applicable to power. Election. The fundamental principle of election is, that no one shall claim under, and also in opposition to, the same instrument.

"It is generally said," observes Chance,⁹⁷ "that the doctrine of election cannot apply with respect to *limited* powers, where there is no other fund but that which is the subject of the power. This, however, it is apprehended, must be received with some qualification, since it seems clear that an appointee may be made to elect between his interest in the fund appointed, and his interest in the fund left unappointed, provided a clear intention appear for that purpose; or, in other words, that an appointment may be made conditionally, and so as to give it the effect of the common hotchpot clause."

(97) 2 Pow. p. 566.

Where a power is to appoint to two, and the donee appoints to one only, and gives a legacy to the other, this is a case of election.

Satisfaction. 8. Upon the question of satisfaction generally, there is little that particularly respects powers; though some cases, as, for instance, where the shares of children are subject to variation, &c., might, under particular circumstances, present great difficulties.⁹⁸

Non execution. 9. It is "an immutable rule that the *non-execution* of a power cannot be aided in equity. Where a provision is admitted to be clearly a power and a mere power, and the donee has died without having executed, or made any attempt, or shewn any wish to execute it, it seems to follow in general as of course, that the power has become a perfect nullity. Yet equity will cure the non-execution of a power, when it is such a court of equity considers as partaking so much of the nature and qualities of a trust, that it becomes the duty of the party to whom it is given to execute it: in which case, should the donee die before he has discharged that duty, the court will supply the non-execution of the power."⁹⁹

(98) 2 Chance, p. 568, *et seq.*

(99) *Holmes v. Coghill*, 7 Ves. 499; *Brown v. Higgs*, 8 Ves. 570.

It is necessary to observe, that a distinction is taken, *even in equity*, betwixt a *non-execution* and a *defective* execution of a power. For, though the courts of equity will, under certain circumstances, help the latter, they will *never* aid the *former*, because so to do, would be repugnant to the nature of a power; which always leaves it to the free will and election of the party to whom the power is given, whether to execute it, or not; for which reason equity will not compel the execution of a power, or construe the act *as done*, when there is *no evidence of the intention* of the party to do it.

The grounds on which courts of equity interpose, in relieving against the omission of circumstances in legal proceedings, may be comprised under three heads, viz. accident or fraud, or trust on the one side, and a consideration or confidence on the other; for, in contemplation of equity, every person executing an instrument to convey property for a consideration, or undertaking a confidence, is, after having received that consideration, or subjected himself

If a power be badly created, as if it be so raised that it cannot be exercised, it will not *therefore* devolve on the Court of Chancery; for powers devolving on the Court of Chancery are confined to *such* as are WELL created in the original, but by accident, as the death of persons, &c. *cannot* be *executed* by those persons. In such cases there is a natural *substitution* of the Court in *the room* of those persons. But if a power be void *in the original*, there is *nothing* to devolve on the Court.¹⁰⁰

10. It is to be remarked, that an instrument executing a power may be avoided, at law, upon the same grounds as deeds in general, *ex. gra.* by material rasure; by the person for whose benefit it was intended; from an illegal or immoral consideration; the transaction being plainly fraudulent, &c.

Void powers
at law.

11. Where the value of jointure-land is fixed, Lord

As to the va-
lue of join-
ture-land.

to that confidence, under a *moral obligation* to make a perfect and complete transfer of that for which the consideration was given, or to perform the trust confidentially reposed in him: and the existence of that moral obligation is the foundation of the jurisdiction of the Court of Chancery, which presides over the consciences of men.

As a court of equity will dispense with the form of the instrument by which an appointment, in pursuance of a power, is made; so, likewise, it will *supply* any deficiency in the circumstances required to attend the execution of such power, when it is executed for a *valuable consideration*.

And equity will supply a defect by reason of a variance from the circumstances required by a power, as well when the power is executed for a *good*, as when it is executed for a *valuable consideration*.

And, in favour of children, a court of equity will not only aid an appointment under a power *defectively executed*, but also a power defective in itself; as, a lease made under a covenant, to stand seised in consideration of natural affection.

And if a power be first executed *defectively* as to part only of the interest which the appointer has, by virtue thereof, a dominion over, and then he executes it *defectively* as to the whole, a court of equity will, in favour of a purchaser for a valuable consideration, reject the first appointment, and supply any defect in the last, the *intention* being evident.—*Powell on Powers*, pp. 156—192.

(100) *Powell on Powers*, p. 380.

Hardwicke determined,¹⁰¹ that such value is to be taken as it stood at the time of the execution of the power. If, by any accident after the execution of a power, there should be an excess, it will be for the benefit of the jointress. By parity of reason, if there should be any deficiency by inundation, or casualties, the jointress must acquiesce under it; to construe it otherwise would make these powers desultory. Lord Northington, however, held¹⁰² that the value cannot be fixed with justice but at the time of the husband's death. The wife cannot know the value but by inspection of leases, or by information, if the estates are in hand. The rent taken at a particular time, and under a particular letting, ought not to bind the wife. The rent of an estate is very uncertain; it often varies; the landlord is often obliged to give boons. Where he has been at any expense of improving, it is common for the tenant, instead of paying a sum of money for the improvements, to pay an increase of rent.

Upon this diversity of opinion, Sugden makes¹⁰³ this commentary:—The value must be taken as it stood at some given time, and Lord Hardwicke's is decidedly the better rule. For by that rule, if the power be duly executed, with reference to the time of its execution, no question can arise upon any subsequent rise or fall in the value of the lands: whereas, if Lord Northington's opinion were to be followed, nearly every case of this nature would occasion a suit in equity; because in most cases the lands would fall or rise in value between the time of the execution of the power and the husband's death.

(101) *Blandford v. Marlborough*, 2 Atk. 542.

(102) *Londonderry v. Wayne*, Ambl. 424.

(103) 2 Pow. 297.

CHAPTER VIII.

THE DESTRUCTION OF POWERS.

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|--------------------------|--|-------------------------------------|
| 1. Suspension of powers. | | 4. Merging. |
| 2. Extinguishment. | | 5. As to a power simply collateral. |
| 3. Barring. | | |

1. As to powers appendant, they are suspended by an ^{Suspension of powers.} interest granted by the donee out of his own estate, thus, if a tenant for life, with a power of revocation, grant a lease to take effect out of his interest, common equity requires that he should not be permitted to defeat his own act. A lease for years, granted by the donee of a power, cannot be defeated by the subsequent exercise of the power, yet, the right of exercising the power is not suspended, but the estates subsequently created under the power will be postponed till the determination of such a grant. If, however, a tenant for life, with a power of leasing *in possession*, grant a lease out of his interest, the power would be really suspended, for the power only authorizes the grant of leases in possession, but the donee has shut himself out from making such a lease, by his prior lease already made. As to powers in gross, they would not be suspended by the grant of a lease, for they are independent of the donee's estate.

2. The alienation of the whole estate extinguishes a ^{Extinguishment.} power appendant, when its exercise would defeat the interest granted, as, if tenant for life, with power to grant leases in possession, alien his life-estate, the power is extinguished, for the exercise of such a power would derogate his own grant. Besides the power cannot be transferred

to the alienee of the estate, nor can it be reserved, distinct from the estate. But, where the grant is by way of a security, as a mortgage, the power is not destroyed, since it would be contrary to the intention of all the parties to hold that the power was extinguished. It is a recognised principle, that powers, whether as regards their creation, execution or destruction, depend on the substantial intent and purpose of the parties concerned. A mortgage, it is to be observed, is never deemed a parting with the estate pledged.

Sir Edward Sugden¹⁰⁴ has drawn the following corollaries from the conflict of authorities:—

A tenant for life, with a power of leasing, may exercise it,

(1.) Although he have conveyed away his whole life estate by way of mortgage or security, provided he have reserved to himself that right against the incumbrancer.

(2.) And even, although in such a conveyance he have not reserved to himself a right to exercise his power as against the incumbrancer. But upon this the authorities differ. He cannot, however, by the exercise of his power, defeat any incumbrance which he has created.

A tenant for life, with a power of sale and exchange, may exercise it,

(1.) Although he have created an interest out of his life-estate, (but reserved his reversion so as to remain tenant for life under the settlement), and although he have not reserved to himself any right to exercise the power against his incumbrancer: but in such a case the incumbrance is not affected.

(2.) And even where he has parted with his whole life-estate by way of mortgage or security, and although he have not reserved to himself the right to exercise the power against the incumbrancer.

It is the constant practice to make a mortgage for years, dependent upon the life, the mortgagor covenanting not to exercise his power of leasing without the mortgagee's consent; thus, the donee still remains tenant for life, and so preserves the character in which the power was reposed in him. Of course, he can restrain the exercise of his power, and as the mortgagee would consent to its exercise, a lease might, without objection, still override the original life-estate, including the term carved out of it, as if no mortgage had been created.

Where an estate is limited to such uses as A shall appoint, and in default of and until appointment to him in fee, the power is appendant, and by a conveyance of his interest would be destroyed.

A power collateral, or in gross, is not extinguished by a conveyance of the life-estate, because such a power does not fall within the compass of the donee's estate, but takes effect out of an interest not vested in him.

If the donee of a power in gross be only tenant for years, an assignment of the whole term will not defeat the power; but if the donee, tenant for life, join in a settlement to new uses, his power is destroyed, where the contrary construction would enable him to defeat his own grant: a new power should always be reserved.

A power not simply collateral may be extinguished, either wholly or in part, by a release to any one, who has an estate of freehold, either present or expectant, in the property.

3. If a power be appendant as to some estates, and in Barring. gross as to others, an act of the donee may bar it, so far as it is appendant, and leave it in full force, so far as it operates as a power in gross.

4. When an estate is limited to such uses as A should Merging. appoint, and in default of appointment to himself in fee,

the power does not merge in the fee ; at least, this is the present leaning of the authorities.¹⁰⁵

As to a power
simply col-
lateral.

5. The donee of a power simply collateral cannot suspend or extinguish his power,¹⁰⁶ for he possesses but a mere authority, and has no interest in the land.¹⁰⁷ Thus, where executors have a bare power to sell land, though they make a transfer, yet they may afterwards sell.¹⁰⁸ And such a power can neither be barred, nor extinguished, by the act of any other person.

(105) 1 Sug. Pow. c. 2, § 6, p. 105.

(106) Appendix, No. 1, to Sugden on Powers.

(107) 5 Mod. p. 457.

(108) A simple collateral power imparting, as hath been said, *no interest whatever* to the *person* who is to execute it, mediately or immediately, either in the estate *out* of which the power takes effect, or the estate *created* by *virtue* of the power, the law considers such person as having *barely* a naked authority to do the act necessary to execute the power over another person's estate, and therefore holds, that any alteration of the estate by such person is, *quoad* the exercise of the authority vested in that person, *merely* void: therefore a feoffment or release made by such person, being donee of the power, will not extinguish such simple collateral power. *Powell on Powers*, p. 14.

TRACTATE IV.

ON TITLE:
ABSTRACTS OF TITLE, AND REGISTRATION
OF DEEDS, &c.

"Titulus est justa causa possidendi id quod nostrum est."—1 Inst. 345

INTRODUCTORY.

IN dealing with the subject of TITLE, we will, in the first place, address ourselves to the several ways in which it is acquired, and discuss the particular legal rules in relation to each ; then the Abstract of Title, with its requisites, will claim our attention ; and, lastly, we will endeavour to explain the principles governing the Deduction of a Title in given cases, together with the cautions and requirements necessary to be adopted as to Searches for Incumbrances, and Registration.

CHAPTER I.

TITLE : ITS COMPOSITION, PERIOD, AND KINDS.

- | | |
|---|---|
| 1. Described.
2. Prescriptive title.
3. The right of possession.
4. The right of property.
5. Composition of a perfect title. | 6. Period of title, and principle upon which it is so fixed.
7. Examples, shewing the necessity of tracing further than sixty years.
8. The ordinary mode of acquiring title. |
|---|---|

Described.

1. The right by which a person protects his property from the claims and trespasses of others, is denominated his **TITLE**. It is the legal proof, whereby an owner authenticates his lawful interest to his own possessions, and measures the extent of his authority over them. A man's title furnishes the criterion, which decides whether his acts, contracts, or engagements in relation to his lands, tenements or hereditaments, are justifiable, valid and binding. It defines the proprietary right, and points out how far its exercise is warranted and safe, and when it is hazardous, excessive, and indefensible. Title, indeed, is the muniment assuring the proper use of one's own, and also the guaranty for its alienation, *i. e.*, the giving or selling it. By virtue of a valid title the occupation of property is rendered secure, its interruptions redressed, its wrongs punished, its rights established, its purchases validated, and confidence in transactions between man and man secured and upheld. It is a subject, the importance of which cannot easily be over-estimated; let us, then, attempt a development of its fundamental principles and particular doctrines.

There are several gradations of title, ranging from bare presumption to highly probable certainty. But a

perfect and unquestionable title is made up of these three particulars:—(1) simple possession; (2) right of possession; and (3) right of property. We will illustrate these particulars.

2. A barely presumptive title, which is of the very ^{Presumptive title.} lowest order,¹ arises out of the mere occupation or simple possession of property. The law assumes that the actual occupant of land has the fee-simple in it,² unless there be evidence rebutting such presumption,³ or his possession be properly explained and shewn to be consonant with the right of the true proprietor of the reversionary fee. Such a presumption, in the absence of any satisfactory proof to the contrary, will sustain an action for a trespass by a wrongdoer,⁴ and will indeed be strengthened, by lapse of time, into a title complete and indefeasible.

In *Doe v. Cook*,⁵ which was tried in 1830, the lessor of the plaintiff proved that his father had let the premises, and received rent from 1797 to 1811, and that lessor had re-

(1) The first degree of title is the bare possession, or actual occupation, of the estate, without any apparent right, or any pretence of right, to hold and continue such possession. This may happen where one man dispossesses another; or where, after the death of the ancestor, and before the entry of the heir, a stranger abates and holds out the heir. In these cases the dispossessor or abator has only a mere naked possession, which the rightful owner may defeat by an entry on the land; but, in the mean time, till some act is done by the rightful owner to divest this possession and assert his title, such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title.—Cruise's Digest, title xxix, "Descent," ch. 1, § 3, Vol. I., p. 312.

(2) An estate gained by wrong, is always a *quasi fee*, for wrong is unlimited and uncontained within rules.

(3) *Jayne v. Price*, 5 Taunt. 326; *Doe v. Barnard*, Cowp. 595; *Doe v. Clark*, 8 B. & C. 717.

(4) *Harper v. Charlsworth*, 4 B. & C. 574.

(5) 7 Bing. 346.

ceived a higher rent from 1816 to 1819, and that he the plaintiff was heir. The defendant proved that he had been in possession since 1829; and, after argument upon a rule *nisi* for a new trial, *Tindal C.J.*, said: "It was proved that the father of the lessor of plaintiff and his son held the premises for twenty-three years, and during that time received and increased the rent, an unequivocal act of ownership, from which the law presumes a seisin in fee. The father died seised, and he is his heir. That would be enough, even in a writ of right,⁶ to call on the tenant to establish a stronger claim. I cannot see why any period short of twenty years' possession by the defendant should raise a presumption sufficient to outweigh the presumption arising from the first twenty years. In many cases it would be extremely hard to cast on the lessor of the plaintiff the burden of showing how the defendant came into the possession. The lessor of the plaintiff may have been an infant, or out of the kingdom at the time. The earlier presumption, therefore, must prevail till a better title is shown."

This assumption is based on the well known feudal maxim, that seisin must be the basis or stand-point in the deduction of every title, except, as we shall presently see, in the case of descent.

The right of possession.

3. The next particular which enters into the composition of a perfect title, is a right to the possession. Now it is obvious that the right may exist in one person, whilst another is in actual possession of the property. It is easily illustrated in the case of a disseisin,⁷ or turning-out

(6) Now abolished by 3 & 4 Wm. IV., c. 27, § 36.

(7) The lawful seisin of a *freehold* estate may be interrupted by ouster or dispossession, the varieties being,—

(a) *Abatement*, which word is, in this sense, used figuratively, and not primitively, and means a wrongful entry of a stranger against the

of possession; the disseisor or wrong-doer will have the actual ostensible possession, but the disseisee or person dispossessed retains the right to the possession, upon the strength of which he may regain by action the enjoyment of his estate by the forcible ejectment, if necessary, of the person perpetrating the wrong.

This right of possession is either (1) apparent, which may be rebutted by a better right, or (2) actual, which will repel every attack made upon it. To pursue the above illustration, the disseisor has a right of possession, which will pre-

heir-at-law, or immediate devisee, upon the possession of an estate becoming vacated by the death of the owner in fee.

(β) *Intrusion*, which is a wrongful entry of a stranger against a remainder-man or reversioner, upon the possession of an estate becoming vacated by the determination of the particular estate. These two species of ousters differ, in that while the latter is always to the prejudice of persons in remainder or reversion, the former is to the prejudice of the heir-at-law, or devisee.

(γ) *Disseisin*, which is the forcible or fraudulent eviction of a possessed freeholder.

(δ) *Deforcement*, which is a wrongful holding on, after the determination of a rightful possession, as where a tenant *pour autre vie* continue in possession after the death of his *cestui que vie*, or one coparcener hold adversely to her sister.

(ε) *Discontinuance*, as where a tenant in tail in possession conveyed the fee-simple by a tortious assurance, which is now abolished by 8 & 9 Vict., c. 106, § 4.

The dispossession, or ouster, of *chattels-real*, takes place, either by

(α) The turning out of the legal proprietor from his estate by *elegit*, before he has been satisfied the sum of money for which the law gave to him such estate; or

(β) The eviction of a tenant from an estate during the continuance of his term of years in it.

The abolition of nearly all the real and mixed actions, by the Statute treated of in the text, and adverse possession not now depending upon disseisin, render the minute distinctions between the several species of ouster comparatively of little consequence in modern days.— See Blackstone's Commentaries, original text, Vol. III., cc. x. and xi., where the old law is elaborately explained.

vail against all other persons, the disseisee and those claiming under him alone excepted, but inasmuch as the disseisee may evict him, the right of possession is paramount; he, then, has the actual right, whilst the disseisor has but the apparent right.

The right of property.

4. The last ingredient in a complete title is the right of property—the *jus proprietatis*⁸ of feudalism—of which possession forms no part. It is that mere right which is left in the lawful owner, after he has neglected to take (and consequently has lost) his remedy to recover possession of his own estate. In modern times the right of possession and the right of property are coincident,⁹ for the remedy to recover possession of property, and the time given to assert the right of property, are both limited to twenty years by the 3 and 4 Wm. IV. c. 27, a statute which will be considered¹⁰ in the third chapter.

(8) It is to be known that there is *jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis et jus possessionis*, a right both of property and possession. And this is anciently called *jus duplicatum*, or *droit-droit*: for example,—A man may be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis*; and if the disseisee release to the disseisor, he hath *jus proprietatis et possessionis*.—1 Inst. 266 a.

(9) The distinction between the right of possession and the right of property is now reduced to this,—that though the right of possession may be in one person, as against *strangers*, and the right of property be in another, yet the right of property can exist no longer as a mere right; but only in connexion with a right of entry at least.—1 Hayes's Conv. 268.

(10) Blackstone (2 Com. p. 198) in shewing that the actual possession, the right of possession, and the right of property, may be in different persons at the same time, points out the different periods within which it was necessary to pursue these different rights. The passage is this:—"Thus if a disseisor turn me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession and right of property*. If the disseisor die, and the lands descend to his son, the son gains an *apparent right of possession*; but I still retain the *actual right* both of *possession and property*. If I acquiesce for thirty years, without bringing any action

5. Whenever, then, these three circumstances, namely, (1) actual possession, (2) the right of possession, and (3) the right of property, belong to one person in relation to realty, he is then said to have a complete, indefeasible and marketable title thereto, beyond all controversy, doubt, or objection.

Composition
of a perfect
title.

6. An owner of realty, who proposes to sell, mortgage, or settle his estate, must be prepared to deduce his title to the possession¹¹ of it during a period of sixty years, at least, previously to such sale, &c. The doubts which existed as to the time at which a title should commence, have been set at rest, for *Lyndhurst L. C.* ruled as follows in *Cooper v. Emery*:¹²—"It was supposed that by the operation of that act,¹³ it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but that some shorter period would be proper. It appears that conveyancers have entertained different opinions on the subject; but, after considering it, I am of opinion that the statute does not introduce any new rule in this respect; and that to introduce any new rule shortening the period would affect the security of titles. One ground of the

Period of
title, and
principle
upon which
it is so fixed.

to recover possession of the lands, the son gains the *actual right of possession*, and I retain nothing but the *mere right of property*. And even this right of property will fail, or, at least, be without a remedy, unless I pursue it within the space of sixty years."

(11) When it is said that a title commencing sixty years back is sufficient, it must be understood that a title to the possession is meant; for the argument in favour of the title is founded on the conformity of the possession during sixty years with the early assurances. But no inference in favour of the title to a reversion arises from lapse of time; and, therefore, however remote may be the origin of a reversionary estate, its creation must be shewn, and the subsequent enjoyment of the possession under the instrument must be regularly established.—1 Sweet's Jarim. Bytne. 61.

(12) 1 Phill. pp. 389, 390. A. D. 1844.

(13) 3 & 4 W. IV., c. 27.

rule was the duration of human life,¹⁴ and that is not affected by the statute. It is true that in other respects the security of a sixty years' title is better now than it was before. But I think that is not a sufficient reason for

(14) Opinions differ as to the reason why sixty years were laid down as the measure in the deduction of title.

Mr. Jarman says (1 Conv. p. 60) :—" One feels, however, some hesitation in acceding to the notion, that the rule in question was established in reference exclusively to the duration of human life, without regard to the limitation of real actions ; seeing the exact correspondence between the periods of title and limitation, and that the rule, if framed with a view to the claim of a remainder-man, falls short of its aim, as even an estate for life (to say nothing of an estate-tail) may outlast the period of sixty years. The probability is, that when it became necessary to establish the *minimum* extent to which abstracts of title, under all circumstances, should reach, sixty years were fixed on as being the period when an adverse possession would confer an unimpeachable title *with little or no regard to the case of a tenancy for life, or a tenancy in tail, either of which would evidently have suggested the necessity of a more extended range of investigation.*"

Mr. Brodie is reported (1 Hayes's Conv. p. 566) to have given this opinion :

" It is a common notion that the present length of abstracts is, with reference to the limitation of sixty years [for a writ of right], the extreme remedy of the old law. This is quite a mistake. It is with *reference to the duration of human life*; and so long as the law will not allow a remainder-man, expectant on an estate for life, to be barred by a possession adverse to the tenant for life, a purchaser will be entitled to require a title to be shewn for the same period as heretofore under the old law."

Sugden's view is this :

" Now it cannot be admitted that the sixty years was a period adopted with reference to the duration of human life ; nor would that rule effect the alleged object in many cases. The term of sixty years was, no doubt, adopted strictly with reference to the time allowed for a real action, and although it did not provide against all claimants, some of whose rights would not have been barred by the old statutes within that period, yet as a purchaser, in the absence of any trace of a claim, was forced to be satisfied with a moral certainty of a good title, and as the term of sixty years was of sufficient duration to meet any probable outstanding claim depending upon the duration of even a long life, that time was considered sufficient as well to give to a purchaser the benefit of the Statute of Limitations as to protect

shortening the period, for adopting forty years, or, as it has been suggested by a high authority, fifty years¹⁵

him against any unknown claimants, who, after all, might not be barred by the statutes."—2 V. & P., p. 136.

"It has long been an established rule among conveyancers, grounded, it is supposed, on the bar created by the statute 32 Hen. VIII., c. 2, and 21 Jac. I., c. 16, to require the production of a good title, extending over a period of at least sixty years. There is little doubt, however, that though this bar most probably suggested the rule, it does not alone account for it; and if the broad distinction between the *cause* of a rule and the *occasion* of it, had been borne in mind, the recent stat. 3 & 4 Will. IV., c. 27, which fixes the ultimate period of limitation at forty years, could hardly have given rise to any difference of opinion in regard to its operation on this rule. It is clear that the remedies of persons entitled in remainder after estates for life, could not be barred by any wrongful ownership, while such particular estate continued, notwithstanding the period of sixty years might have elapsed. And in this respect the new law effects no change. According to Mr. Brodie's opinion, suggested apparently, though certainly not justified, by Mr. Tyrrell's remarks on this subject, the technical rule we are considering was framed, not with reference to the limitation of sixty years, but with reference to the duration of human life; on the ground that the law will not allow a remainder-man expectant on an estate for life to be barred by a possession adverse to the tenant for life. This, indeed, may be a very good reason why the period adopted should not be *less* than the usual duration of human life; but it can hardly alone account for the rule itself, for that rule is too limited to denote the *extreme* duration of life; and the *mean* duration of life in England does not, in fact, exceed *thirty-six* years. And why should the right of a remainder-man, expectant on an *estate for life*, have been *exclusively* regarded?"—1 Martin's Conv. pp. 139, 142.

(15) Sugden suggested it in the following passage :—"Now the time, within which claims in general can be made, is reduced from sixty to forty years, and the question is whether the abstract is to be reduced in like manner.

"If we suppose that a seller has only a forty years' title, but that there have been repeated sales and mortgages, and there is no reason to believe that the title took its root from a tenant for life, or from a person who claimed under one, it would seem to be clear that the purchaser would be compelled to accept the title, although before the late statute the title would have been unmarketable. But if there is any reasonable ground for suspicion on this head, equity would not force the title upon a purchaser. The danger of a title being disturbed at the end of forty years, in consequence of

instead of the sixty. *I think the rule ought to remain as it is, and that it would be dangerous to make any alteration."*

As an illustration of the danger, take such an instance as this.¹⁶ The vendor's title may commence forty or sixty years ago, with a simple conveyance in fee from A. to B.; but A.; or his predecessors in title, may have dispo-

a sale of the fee by a tenant for life before that period, and which has remained unknown during that time, is not very great. For where a person claiming under a tenant for life begins to act as owner of the inheritance, the attention of the remainder-man is quickly aroused, and the infirmity of the title is made generally known. Where the estate is settled upon marriage, the majority of a son soon leads to a discovery of the father's fraud.

"In the general run of cases, however, the vendor will be in possession of documents spreading over sixty years, and then the question arises, is the seller bound to abstract them ?

"A seller ought not to stickle over much upon this point, where the prior title would not lead to much expense; but if a clear title is shown for forty years, without anything upon the face of it to lead to an inference that it is derived under a tenant for life, I should apprehend that the purchaser would be compelled to accept it, but he would be entitled, if he pleased, to look at the earlier deeds, although he could not require an abstract of them, in order to see that the title was not derived under a tenant for life. Sixty years would not, in many cases, meet the danger proposed to be guarded against, and it seems difficult, therefore, now to continue that period as an arbitrary rule, when the object for which it was originally introduced will be effected by a forty years' title. Still, even sixty years may not be sufficiently far to carry the title back; but it seems too much now to say that every man must produce at least a sixty years' title, because there may have been during all that period an adverse possession against a tenant for life only. A title commencing with an infirm foundation can generally be detected, from something appearing on the face of it. It is not probable that the courts will be called upon to lay down a general rule upon this subject, but in practice a convenient rule will no doubt be adopted; and this, taking a middle course, will perhaps be to furnish a fifty years' title in ordinary cases. There will be but few titles disturbed under a clear title for half a century where the property has undergone the usual transfers upon sales and mortgages, and the possession has gone along with the title."—2 V. and P pp. 137—139.

(16) 1 Hayes's Conv., p. 233.

sessed C., a tenant for life, or A. himself may have been merely a tenant for life, or tenant *pour autrevie*. In either case, if the life be still in existence, or if it have dropped within twenty years, or if, having dropped twenty years ago or upwards, the right of the remainder-man or reversioner have been kept alive by any disability, the purchaser accepting the title must be in imminent danger of eviction.¹⁷

7. It is material in some cases to carry back the title to a more remote period than sixty years.¹⁸ For it must not

Examples,
shewing the
necessity of

(17) Eviction may occur after a possession of much more extended duration than forty years, under such circumstances as the following:—Lands are devised by will to A. by words which are considered to carry the inheritance. A. sells and conveys (as is supposed) the fee-simple. For more than sixty years the property is enjoyed under this conveyance, A. being alive throughout this period; but on his death at an advanced age, the purchaser in possession is aroused from his dream of fancied security by an ejectment on the part of the testator's heir-at-law, who claims and recovers the property, on the ground that A., according to the true construction of the will, was devisee for life only, which claim being made within twenty years after A's decease, would be consistent with the recent no less than the old Statute of Limitations. Supposing the conveyance by the devisee not to disclose the infirmity of his title, it is quite possible that the evicted purchaser may have been coerced into the specific performance of the contract by the decree of a Court of Equity, for, after sixty years' possession, a title under such conveyance would be clearly marketable. The rule against perpetuities forms one of the strongholds of a purchaser's security; now under this rule it may happen that a limited and terminable ownership may subsist for more than sixty years (namely, for a life and twenty-one years); it is therefore impossible, without hazard of doing injustice, to pronounce a title of shorter duration than sixty years to be marketable.—1 Sweet's Jarm. Bytbe., 60 and 61.

(18) One of the principal causes why it will still be often necessary to deduce the title from a more distant period than even sixty years, is the equitable doctrine of notice. It is a received maxim, that whoever acquires an estate with notice—whether actual or constructive—of any trusts to which such estate is liable, becomes, in contemplation of equity, a trustee, and bound to perform the trusts accordingly. And it is a rule, that “notice

tracing further than sixty years.

be assumed that a vendor can arbitrarily limit his title by a deed because it happens to be sixty years old. It is always implied that the first deed exhibits a good root, which leads morally to the conclusion of an unimpeachable title, otherwise the period of sixty years is not sufficient; for the title must then be traced to such a time as will satisfy all legitimate inquiry, and complete the proper evidence of a sound and impregnable title. And this is especially necessary when the first deed within this period is founded on a prior deed, as an appointment in execution of a power. An abstract¹⁹ of the deed which created the power should be furnished, although there may be a very full recital of

of any instrument is notice of all its contents." But, although the *recital* of a deed *e. g.*, is constructive notice of its contents, "yet to say," observed Sir John Leach, V. C. (*Prosser v. Watts*, 6 Madd. 60), "that a purchaser is not to complete his contract, unless he has the actual inspection of every deed, of which he has constructive notice by recital, would lead to a practical inconvenience which would be manifestly absurd. In some families, title-deeds are preserved for centuries; and if the earliest of those deeds recites a former instrument, made five hundred years since, but not now existing, it would be absurd to say that a contract is not to be enforced against a purchaser, because that deed cannot be produced. There must of necessity, therefore, be some practical limit to the operation of this objection; and the true inquiry seems to be in every case, whether the absence of the deed recited throws any reasonable doubt upon the title of the vendor. *Primâ facie*, it is to be presumed, that the purchaser in the ancient conveyance had an actual inspection of every deed recited, and was satisfied with their contents; and further it is to be observed, that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no circumstance to repel the general effect of these presumptions, and when the title under the conveyance which contains the recital, is fortified by sixty years' undisputed possession, I think it a good practical rule to hold, that the loss of a deed recited throws no reasonable doubt upon the title of the vendor, and that the purchaser must complete his purchase."—1 Martin's Conv. pp. 144—146.

(19) The requisites of an abstract of title will be shewn in the seventh chapter.

it in the appointment. If this be not done, the vendee or mortgagee should require its production.²⁰

So in the case of a marriage settlement, made pursuant to articles: they should be set out, in order to satisfy the purchaser that the settlement is a due and proper performance of them.²¹

So, if it might be reasonably presumed from the state of the abstract, that estates tail were subsisting, the purchaser might demand the production of the prior title.

So, if an abstract begin with a conveyance by a person who is stated to be heir-at-law of any person, the purchaser

(20) In general, appointments contain a full recital of the power under which they are made; and recovery deeds contain a history of the creation of an estate tail; and this recital is, in reference to ancient deeds generally, and by experienced men, treated as satisfactory on the point of the existence of the power, of the creation of the entail, of the mode in which the power was to be executed, and the circumstances and ceremonies which were to attend the execution.

But *inaccuracies* in a deed or will, betraying the want of professional knowledge in the person preparing the instrument, lead to an inquiry for an inspection of the deed containing the power.—1 Prest. Abs. 7.

(21) As often as an abstract commences with a settlement, made in pursuance of *articles* or under a *trust*, the articles, especially if entered into and executed previously to the marriage, or the *deed creating the trust*, should be abstracted as far as they are material; and if they are omitted by the vendor's solicitor out of the abstract, this omission should be supplied, as far as it shall be feasible, at the instance of the solicitor for the purchaser.

And if the articles or deed creating the trust cannot be found, the *recitals* of the articles, and of the trusts on which the settlement is founded, should be stated fully, as far as they are introduced into the settlement, and are material to the title,

After acquiescence in the settlement for a long series of years, recitals are frequently deemed sufficient evidence of the contents of the articles.

But if, as sometimes happens, the settlement is made *in pursuance* of the articles or trusts, and merely with reference to them, without stating the particulars of the articles or the trusts on which the settlement is founded, the conveyancer will be driven to the necessity of considering whether the settlement is such as the nature of the case seems to have required. 1 Prest. Abs. 9.

may call for proof of the heir's legitimacy²² and his ancestor's intestacy, and if the seller is in possession of it, he will be bound to produce it; but if he have no such evidence, and there is nothing on the face of the title to draw into doubt the fact, of course the purchaser must be content with the statement in the conveyance, which depends upon the intestacy; being grounded upon the title of the heir at law in that character. In truth the object of the inquiry is to ascertain whether to the seller's knowledge there was a will.²³

Also, as often as a title is for a *term of years*, the creation of the term should be shewn from the original deed or will, if it be in existence; or if the deed creating the term be lost, the creation of the term should be stated from the recitals, as found in the more ancient deeds; and there should be a rigid adherence to the language of such recital.²⁴

And in every case where the statement in the abstract, or its silence, leads to a fair inference that the prior title may disclose an existing defect, the purchaser may require it to be produced, although where it is not in the seller's power, he cannot object to the title upon mere suspicion.²⁵

(22) The certificate of baptism, and an affidavit of legitimacy, are the proper precautions against a surprise in this particular.—1 Prest. Abr. 46.

(23) 2 Sugd. V. & P. p. 133; 1 Sweet's Jarm. Bythe. 65.

(24) A title has oftentimes been treated as defective, because the deed creating the term, could not be found; but it has always appeared to the writer of these observations (Mr. Preston.) that a title depending on a term for years, created at a distinct period, may be good notwithstanding the loss of the deed creating the term.—1 Prest. Abs. 21. One danger which formerly attended the title of leasehold estates, the possibility of the representative to a deceased owner having been dormant for many years, from the neglect of any person to obtain administration to his effects, no longer exists; the Statute of Limitations, 3 & 4 Wm. IV., c. 27, § 6, having enacted that time shall run against an administrator *during the dormancy of the representation*.

(25) 2 Sugd. V. & P. p. 133.

8. There are three modes of acquiring a title to realty :— The ordinary modes of acquiring title.

(1.) By operation of law.

(2.) By purchase, as contra-distinguished from law, and

(3.) By law and purchase.

Title by operation of law is either by (*a*) descent, or (*b*) prescription.

Title by purchase is either²⁶ by (*a*) forfeiture, or (*b*) alienage.

Title by law and purchase is by escheatage.

We will illustrate these five species of title, in the five following chapters.

(26) The text writers give occupancy, which is described as the taking possession of property, which did not, at the time, belong to anybody ; but this is now entirely exploded. The law had confined it to this single instance :—Where a person was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs), for the life of another man, and died (without alienation), during the life of *cestui que vie*, or him by whose life it was holden : in this case he that could first enter on the land might lawfully retain the possession so long as *cestui que vie* lived, by right of occupancy. If, however, the grant to the tenant *pur autre vie* contained words of inheritance, then, his heir would have enjoyed it as special occupant. But now all estates *pur autre vie* are devisable ; and if they are not devised, and they be freehold, the heir, if a special occupant, holds them as assets *per descent* for the payment of the deceased tenant's debts ; but if there be no special occupant, the personal representatives of the deceased tenant takes them as personal assets.—1 Vict., c. 26, §§ 3 and 6. In the mining districts of Derbyshire and Cornwall, by the Stannary Laws, an estate in mines might, and it is believed still may, be gained by occupancy.—*Geary v. Bancroft*, 1 Sid. 347.

CHAPTER II.

DESCENT.

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| <ol style="list-style-type: none"> 1. Described. 2. (I.) THE COMMON LAW CANONS, AS AMENDED BY STATUTE. 3. Who is "the purchaser." Two new modes of acquiring an estate by purchase. 4. <i>First Canon</i>.—Root of descent. 5. Seisin now unnecessary, the old maxim abrogated, and all distinction destroyed between estates in possession and expectancy. 6. Two hard cases. 7. <i>Second Canon</i>. Purchaser's lineal issue. 8. <i>Third Canon</i>. Males preferred to females; Primogeniture; Coparcenary. 9. <i>Fourth Canon</i>. Lineal descendants represent their ancestor. 10. Two illustrations of the rule. 11. <i>Fifth Canon</i>. Inheritances now ascend; Explosion of the feudal | <p style="text-align: right;">maxim, "<i>hæreditas nunquam ascendit</i>."</p> <ol style="list-style-type: none"> 12. <i>Sixth Canon</i>. Brother and sisters trace through their parent. 13. <i>Seventh Canon</i>. Mother of the more remote male ancestor preferred; a vexed point adjusted. 14. <i>Eighth Canon</i>. Precedency of the half blood.; Doctrine of <i>possessio fratris</i> annulled. 15. Descent flows through a person attainted, as well as an alien. 16. <i>Conspectus</i> of the ancient and modern course of descent at the Common Law. 17. (II.) DESCENT BY CUSTOM. 18. (1.) Gavelkind. 19. (2.) Borough-English, or Postremogeniture. 20. (3.) Copy of Court-roll: 21. III.) DESCENT OF ENTAILS. 22. Proofs to establish an heirship. 23. <i>Lex loci rei sitæ</i> governs. |
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Described.

1. Descent, or hereditary succession²⁸ arises either (I) by the common law as amended by the Inheritance Act;²⁹ or (II) by custom; or (III) by statute *de donis conditionalibus*.

This law comes into operation only on the death of the owner of an estate who has not left any testamentary dis-

(28) Succession is of two kinds:—(1.) *Agnatic*, where the issue is derived from male ancestors through the father's side; (2.) *Cognatic*, where the issue is derived from female ancestors, through the mother's side.

(29) 3 & 4 Wm. IV., c. 106.

position of it. It then points out the person who shall succeed to the deceased owner in the enjoyment of such undevised property, and this person is denominated the heir-at-law, who must be legitimate,³⁰ and a natural-

(30) *Hæres*, in the legal understanding of the Common Law, implies that he is *ex justis nuptiis procreatus*, and so *hæres legitimus est quem nuptiæ demonstrant*.

There is, indeed, one instance in which our law has shewn an illegitimate child some little regard ; and that is usually termed the case of *bastard eigné* and *mulier puisné*. This happens when a man has a bastard son, and afterwards marries the mother, and then has by her a legitimate son, who, in the language of the law, is called a *mulier*, or, as Glanvel expresses it in his Latin, *filius mulieratus*, the woman before marriage being *concubina*, and afterwards *mulier*. Now, here the eldest son is a bastard, or *bastard eigné*; and the younger son is legitimate, or *mulier puisné*. If then the father die, and the *bastard eigné* enter upon his land, and enjoy it to his death, and die seised thereof, whereby the inheritance descends to his issue ; in this case the *mulier puisné*, and all other heirs (though minors, feme-coverts, or under any incapacity whatsoever) are totally barred of their right. And this, (1.) As a punishment on the *mulier* for his negligence, in not entering during the bastard's life, and evicting him. (2.) Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime. (3.) Because the canon law (following the civil) did allow such *bastard eigné* to be legitimate on the subsequent marriage of his mother ; and, therefore, the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard ; for, if the mother were never married to the father, such bastard could have no colorable title at all.—2 Bla. Comm. 248.

As to *bastard eigné* and *mulier puisné*, we may observe, that in order to bar the *mulier* and his issue, there must not only be a dying seised (either by a natural or civil death, and that of lands in *fee-simple*) by the bastard, but also a descent-cast ; and, consequently, where these two requisites do not concur, the *mulier* or his issue may enter ; and, therefore, if the bastard die seised without issue, and the lord enter by escheat, the *mulier* is not barred : there being no descent. But if the bastard had entered, and the *mulier* died without issue, but leaving his wife *enceinte*, and then the bastard had issue and died seised, after whose death the posthumous issue of the *mulier* was born, his right was barred, and he was not permitted to enter ; as there were both a dying seised and a descent ; and, consequently, the right of the

born subject,³¹ or else an alien duly made a denizen by the royal letters-patent, or naturalized by act of parliament. The person next in the line of succession is, during his ancestor's life, either an heir apparent, whose right is indefeasible on account of his proximate relationship, or an heir presumptive, being a remote kindred, whose right may be defeated by the birth of a nearer relative. The right of an heir-at-law becomes complete and actual on the death of the ancestor, though even then, when the

bastard established. But, had the bastard died seised without issue, but leaving his wife *enceinte*, and then the *mulier* had entered, and afterwards the son of the bastard had been born, such son could *not* have entered on the *mulier*, he not being barred; there being no descent-cast when the *mulier* entered. For though the law gave the estate to the issue of the bastard, when both these requisites concurred, as a punishment for the *mulier's* negligence, &c., yet, when both these requisites did *not* concur, the issue of the bastard had no title at all.—Watk. on Descents, c. v., p. 219.

It would appear that the effect of this peculiar descent cast is now abolished by 3 & 4 Wm. IV., c. 27, § 39.

(31) The following are natural-born subjects:—All persons born within the dominions of the English Crown, although their parents may be aliens, provided, however, they be alien friends, not alien enemies. The children of the sovereign, the heirs of the crown, and the children of our ambassadors, wherever born, have always been held natural-born subjects.—*Calvin's Case*, 7 Russ. 18 a. All children born abroad, provided both their parents were, at the time of their birth, in allegiance to the crown, and the mother had passed the seas by her husband's consent, might inherit as if born in England.—25 Edw. III., st. 2, 'An Act for the Encouragement of Foreign Commerce.' All children born out of the sovereign's allegiance, whose fathers or grandfathers by the father's side, were natural-born subjects, are now deemed to be natural-born subjects themselves to all intents and purposes, unless their said ancestors were attainted or banished beyond sea for treason; or were, at the birth of such children, in the service of a prince at enmity with us. The grandchildren must claim their estates or interest within five years after their right accrues; 11 & 12 Wm. III., c. 6; 7 Anne, c. 5; 4 Geo. II., c. 21; 25 Geo. II., c. 39; and 13 Geo. III., c. 21. There is no provision made for the children born abroad of a mother, a natural born subject, married to an alien. Where a mother was an English woman, who married a subject of France, and had a son born in France, it was decided that that son would not inherit his mother's lands in England.—*Count Durooure v. Jones*, 4 T. R. 300.

descent has actually taken place, it may be defeated by the subsequent birth of a nearer heir. Thus, where a person dies leaving his wife *enceinte*, the common law, not considering the infant *in ventre matris* to be in existence, casts the fee on the person who is then heir; but when the posthumous child is born, his guardian may enter upon such heir, and take the estate from him. Yet such posthumous child is not entitled to any profits received before his birth, because the entry of the heir was congeable, *i. e.* lawful, till the posthumous child was born.”³²

2. (I.) For the purpose of ascertaining the order of succession, our common law has propounded certain rules, which are known as “the canons of descent.” These canons have been modified and expanded by the Inheritance Act of 3 & 4 Wm. IV., c. 106, as to intestacies happening after the 1st Jan., A.D. 1834.³³ (§ 11.)

(I.) The
Common
Law Canons
as amended
by statute.

(32) 3 Cruise's Digest, title xxix. “Descent,” c. iii., § 12.

(33) Seeing that in the deduction of title, intestacies, before A.D. 1834, are governed by the old canons of descent, for the statute quoted in the text is not retrospective, we give them according to the arrangement of Lord Hale, which Blackstone adopted. Besides, they are of use to compare with the modern canons, thereby more readily exhibiting the changes effected.

When the property is vested or fixed in a person so as to be transmissible to the heirs of such person, whether he himself took by descent, and acquired an actual seisin of the hereditaments descending, or whether he took as first purchaser, such hereditaments shall descend to the right heirs of the person so actually seised of an estate of inheritance in possession, or in whom they are so fixed by purchase; or, if they are in reversion or remainder expectant upon an estate of freehold, to the right heirs of the person creating the particular estate, on which such reversion is expectant; or of the person to whom such remainder is limited; or of him, who, being an intermediate person, has acquired a seisin (if we may call it such) of such reversion or remainder, by the exertion of any act of ownership which is tantamount or equivalent to an actual seisin of hereditaments in possession, according to the following canons:

I. Hereditaments shall lineally descend to the issue of such person *in infinitum*; but shall never lineally ascend.

II. The male issue shall be admitted before the female.

III. Where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether.

Who is the purchaser.

3. The person from whom the descent is traced is called "the purchaser," which should not be confounded with an ordinary vendee. Now a man's ancestor may have enjoyed his property immediately by purchase, or have succeeded to it as heir. The purchaser, however, within the meaning of the Inheritance Act, is he "who last acquired the land *otherwise* than by descent, or than by any escheat, partition, or enclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent. (§ 1.)

Two new modes of acquiring an estate by purchase.

The Inheritance Act has created two new modes of acquiring an estate by purchase, one by the heir-at-law, treating him as a stranger: the other by the grantor or his heirs, under the circumstances narrated in its 3rd section, which enacts:—

"That when any land shall have been devised by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent;³⁴ and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the

IV. The lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor: that is, shall stand in the same place as the person himself would have done had he been living.

V. On failure of lineal descendants, or issue of such person, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

VI. The collateral heir of such person must be his next collateral kinsman of the whole blood.

VII. In collateral inheritances, the male stock shall be preferred to the female; (*i. e.*, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near) unless where the lands have, in fact, descended from a female.—Watkins on Descent, ch. ii.

(34) Limitations made before 1st January, 1834, to the heirs of a person then living, shall take effect as if the act had not been made (§ 12).

heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

Under such circumstances, the heir would have taken, previously to the period fixed in the section, by his elder title as heir, notwithstanding the devise; and the grantor and his heirs, or his heirs only, would have still enjoyed their old estate, the limitation to them being nugatory.

A purchaser's ancestor is to be deemed the purchaser in certain cases detailed by the 4th section, thus:—

"When any person shall have acquired any land by purchase, under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases, such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land."

So the ancestor is thus treated as the first purchaser, though he never enjoyed any estate in the land, which commences with his heirs. The effect of this enactment is as though the limitation had been made to the ancestor and his heirs, but for the purpose only of tracing the descent from him.

4. "The purchaser," then, is the root of the descent; First Canon. —Root of descent. from him, as the *terminus à quo*, it is in every case to be traced.

To the intent, then, that the pedigree may never be

carried further back than the circumstances of the case and the nature of the title shall require, *the person last entitled to the land* (which expression shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof (§ 1),) shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.” (§ 2.)

The effect of this primary rule for ascertaining the source whence descent is to be traced, is this:—if the deceased intestate enjoyed his fee-simple or fee-base land in any way other than by inheriting the same, his heir-at-law must trace his title to inherit the given estate, by reason of consanguinity,³⁵ from him as the root or *propositus*; but if such intestate be proved to have inherited from his ancestor, who purchased the estate, then, that ancestor must be the root or *propositus*. The last owner, in fact, is assumed to be the purchaser, unless it be proved that he took the estate as heir at law; but still a vendee will be entitled to have proof that the assumed “purchaser” within the meaning of this canon, was actually so,

(35) Cousin, or *consanguineus*, means kinsman, in general; and consequently includes brothers and sisters, as well as those whom we usually call cousins. Consanguinity is either lineal or collateral. Lineal, is that which subsists between persons, of whom one is descended in a direct line from the other, as between son, father, grandfather, great grandfather, and so upwards in the direct ascending line; or between son, grandson, great grandson, and so downwards, in the direct descending line. Collateral agree with lineal in that they descend from the same stock or ancestor, but differing in that they do not descend one from the other.

and not be left to rely upon the statutes alone, which would not avail him against evidence of a descent.

5. Actual or virtual seisin is now unnecessary, and the distinction between possessed and expectant estates is destroyed, since they all descend alike to the purchaser's heir-at-law, for the word "land" within the meaning of the act, (§ 1), "shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law or according to the custom of gavelkind or borough-english, or any other custom; and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs; and also to any share of the same hereditaments and properties, or any of them; and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited; and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder or contingency."

Seisin, now unnecessary, the old maxim abrogated, and all distinction destroyed between estates in possession and expectancy.

Take this as an instance of the difference between the old and new law:—If A. died seised of land, and B., his heir, died without making entry; according to the former law, the heir of A., and not of B., would have succeeded to the land, that is, would have had the right of entry thereon; but, by the operation of the Inheritance Act, B. must now be deemed the purchaser, and would accordingly transmit the estate to his own heir.

The following maxim has been altogether superseded:—*Non jus sed Seisina facit Stipitem*.³⁶—It is not the right, but the seisin which makes a person the stock whence the inheritance must descend.

(36) Fleta, lib. vi., c. 14.

Two hard
cases.

6. This rule as to the root of the descent involves two hard cases : one, a son claiming by descent from an illegitimate father who was a purchaser, cannot transmit the estate by descent upon the failure of his own issue to his heir *ex parte maternâ*; for the mother's relations could not as such be heirs to the father, and so the estate must escheat.³⁷

The other case would arise thus:—A. purchases an estate, and dies intestate, leaving three daughters, one of whom dies intestate, without having made herself a purchaser of her share, leaving a son : the deceased daughter's share will be divided into thirds, among her surviving sisters and her son, so that the two daughters will have four-ninths of the entire estate a-piece, and the son one-ninth only.

The case of *Cooper v. France*,³⁸ before the late Vice Chancellor of England, arose under these circumstances :—

George Tomlinson, who was seised in fee of certain hereditaments in Middlesex, died on 13th April, 1826, intestate as to real estates, and leaving Ellen Cooper and Sarah France, his co-heiresses-at-law. Ellen Cooper continued seised of her moiety till the 1st June, 1835, when she died intestate, leaving George Cooper, her eldest son her heir-at-law. Sarah France was alleged to have continued seised of her moiety till the 16th January, 1839, when she died intestate, leaving Benjamin France her eldest son her heir-at-law. The devisees of George Cooper now filed their bill against Benjamin France for a partition, and a question arose under the 3 & 4 Will. IV., c. 106, § 2. The plaintiffs claimed five-eighths of the hereditaments, contending that, under this section, on the death of Ellen Cooper, her moiety descended in moie-

(37) In the bill of the Inheritance Act, a clause was inserted to make the last proprietor, the son in the case stated in the text, the purchaser, in order to let in his maternal relations, but it was struck out in committee.

(38) 14 Jur., Pt. 1, p. 214 and 215 (1850).

ties on Sarah France and George Cooper, as co-heirs of George Tomlinson, who, in the bill, and on the argument, was taken to be the purchaser; therefore Sarah France obtained three-fourths, or six-eighths, and George Cooper one-fourth, or two-eighths; and that on the death of Sarah France her six-eighths descended in moieties on Benjamin France and George Cooper: therefore Benjamin France took three-eighths, and George Cooper took five-eighths. The defendant Benjamin France, on the contrary, contended that his mother's moiety had descended on him, and that the moiety of Ellen Cooper had descended on George Cooper. Both parties requested his Honor to decide the question, but he at first intimated that it would be necessary to send it to a Court of Law.

After argument, the Vice Chancellor gave the following judgment:—

“I cannot bring myself to entertain the least doubt that Ellen's four-eighths descended on her son George. I do not see how any one acquainted with the principles of law can doubt. Can you suppose that an Act of Parliament, by any portion of it, meant to introduce doubt into a case that was so plain before the Act was passed; was it not the meaning of the Act to leave the law of inheritance, in such parts as were plain, absolutely as it was found, and only to alter it where it was doubtful? Just observe what is the purview.—“To the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require,”—that is the general object, stated in distinct words,—“the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same.” There the act is speaking of what ought to be the rule in cases where the thing is doubtful, but not where the thing is so plain that nobody could doubt. You must make it consistent, and if you see an

act was passed to make the thing clear, do not say that the act was to make it doubtful. On looking through the act, that portion of the second section appeared to me so plain, that I shall not send the case to law.

Declare that on the death of Ellen Cooper, her moiety descended upon George Cooper: and that on the death of Sarah France, her moiety descended upon Benjamin France.

Second
Canon.—
Purchaser's
lineal issue.

7. The purchaser having been ascertained, the next rule is that the inheritable estate shall first lineally descend to such purchaser's children, and then to their descendants *in infinitum*; for *linea recta semper præfertur transversali*.

This canon is so obvious that it requires no comment or illustration.

Third Canon.
Males preferred to females; primogeniture; coparcenary.

8. A third canon is that the male descendants shall be admitted before the female descendants, and amongst a number of males in the same degree, the eldest of them shall be preferred in pursuance of the law of primogeniture, but all the females in equal degree take together as coparceners.³⁹

The preference of males to females is further carried out, both in the paternal and maternal lines, by the 3 & 4 Wm. IV., c. 106, § 7, which provides:—

“That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of

(39) Primogeniture, among females, obtains only in the succession to our Crown.

such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed." So that paternal are to be preferred to maternal ancestors : and as between the paternals, males are to be preferred to females, and so as between the maternals. Thus the postponement of the females to the males pervades every gradation of relationship throughout the whole pedigree.

9. The lineal descendants *in infinitum* of a deceased intestate shall represent their ancestors, *i.e.*, shall stand in the same place as the person himself would have done, had he been living. Thus the child, grand-child, or great-grand-child, whether male or female, of the eldest son, succeeds before the younger son, or the daughters, according to the scheme promulgated in the third canon.

Fourth Canon.—
Lineal descendants represent their ancestor.

10. The two following illustrations body forth the operation of this rule :—

Two illustrations of the rule.

If a man have two sons, A. and B., and A. dies leaving two sons, and then the grandfather die : now the eldest son of A. shall succeed to the whole of his grandfather's estate ; and if A. had left two daughters only, they would have succeeded to moieties of the whole, in exclusion of B. and his issue.

But if a man have three daughters only, C., D. and E., and C. die, leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son, who is younger than his sister ; here, when the grandfather dies, the eldest son of C. shall succeed to one-third, in exclusion of the younger, the two daughters of D. to another third, as coparceners, and the son of E. to the remaining third, in exclusion of his eldest sister.

This succession *jure representationis* is denominated *per stirpes*,⁴⁰ since all the branches inherit the same share

(40) Succession *per stirpes*, or according to the roots, is where all the

that their root, *stirps*, or progenitor whom they represent, would have taken.

Fifth Canon.
—Inheritance
now ascend;
explosion of
the feudal maxim
"hereditas
nunquam
ascendit."

11. Upon the failure of the lineal descendants of the purchaser, the inheritance shall ascend in the first place, to the nearest lineal ancestors then living in the preferable line, and then descend to the purchaser's collateral relations, according to the 3rd and 4th canons already explained, the paternal taking precedence of the maternal line,⁴¹ unless the estate have descended from a female, when the converse of the proposition obtains.⁴² This rule was

children take the same share as their root, whom they represent, would have done : thus the descent is kept uniform. Succession *per capita*, is where the issue claim in their own right, as next of kin to the ancestor, without reference to the stock from whom they sprung.

(41) 3 & 4 Wm. IV., c. 106, § 7, already quoted in the text.

(42) If a person succeed to an estate as heir *to his mother*, and die without issue, his heirs, on the part of his mother, shall inherit such estate, and not his heirs on the part of his father : and *è converso*, if it descend from his father, it shall devolve, on the death of the son, to his heirs of the paternal line.

But if a person take an estate by purchase, he takes it *ut feudum antiquum*; and, consequently, it shall descend to his heirs on the part of his father, as of the worthier blood ; the law never calling in the heirs on the part of the mother to the inheritance of the son, unless such inheritance had actually descended from the mother, or until the blood of the father be exhausted. And when the son takes by purchase, it could not possibly (by the terms) have *actually* descended to him from the mother, or from any one else ; but as he takes it *ut antiquum*, the *supposed* or presumed descent is from the father, to whose line the preference in law is given ; and, therefore, as it has been said, the estate acquired by the son, as a *purchaser*, shall descend to his heirs on the part of his father.

For should a son take an estate by purchase, and it be expressly limited to him and his heirs of the part of his mother, yet his heirs of the part of his father shall succeed to the estate ; for it is not in the power of an individual (nor even of the sovereign) to institute a new kind of inheritance not allowed by the law.

We will now enquire what act of the person, seised *ex parte maternâ*, will fix the estate so derived in him or his heirs by purchase, and consequently, change the descent to the paternal line.

And to effect this, he must require or give a new estate . for if the person

introduced by the Inheritance Act, the 6th section of which enacts: "That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir, in preference to any person who would have been entitled to inherit, either

taking be *in*, in anywise, of the old one, he is *not* in as a purchaser, and, therefore, its descent will *not* be changed.

As if the heir enter for condition broken, he is *in* of *the old estate*, and, consequently, by descent.

When a person devises such lands to his right heirs, without changing the tenure or quality of the lands, although he charge them with debts or other incumbrances, yet the heir shall be in by descent, and the lands shall go, on his death without issue, to his heirs on the part of his mother: for descent is favoured in law.

And it is the same as to copyholds, notwithstanding they pass by surrender; for such surrender, and the consequent admission, will not make a new estate.

But if the devisor alter the estate, and limit it differently from what it would have descended to the heir, the heir shall take of course by purchase, it being another estate which must descend from such heir, as the first purchaser to his heirs on the part of his father.

A person cannot raise a fee-simple to his own right heirs, by the name of heirs as a purchase, unless he parts with the whole estate.

Neither can he make the heirs of his body to take by purchase, by conveyance at common law.

But if it had been by way of use, as to A. and his heirs, to the use of B. for life, with remainder to the use of the heirs of the body of the donor; the heirs of his body would take by purchase.

But if the grantor part with his whole estate, and then a limitation be either to his heirs general or special, such heirs shall take by purchase; for here the reason fails: the limitation cannot be considered as the reversion, for that is always a part of the estate granted, which remains in the grantor; but where the whole is granted, there is nothing which can remain in him; and, consequently, there can be no reversion: for if there be a reversion left, he has not granted all. If, therefore, a person grant to A. and his heirs for ever (in fee-simple), he can have no reversion left in him; and so, any estate, limited afterwards to him or his heirs, must be a new estate, and taken by purchase.

When the legal estate descends in fee-simple, *ex parte maternâ*, and the equitable estate, *ex parte paternâ*, or, *vice versâ*, the equitable estate shall merge in the legal; and both shall follow the line through which the legal estates descended.—Watkins on Descent, ch. 5.

by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue."

This canon explodes the old maxim, *hereditas nunquam ascendit*, which Littleton⁴³ thus illustrated:—

"If there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father; the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law that inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son, as by law he ought, and after the uncle dieth, without issue living, the father shall have the land, as heir to the uncle, and not as heir to the son." So that a parent should rather have inherited his child's land by collateral descent, than by lineal ascent. Yet even then an inheritance ascended indirectly, as from a nephew to his uncle. A father or mother may, however, be cousin to their own child; and in that relation might have inherited from him notwithstanding the relation of father and mother, *ex gra.* a son died⁴⁴ seised of lands in fee, without issue, or brother or sister, but leaving two cousins, his heirs at law, one of whom was his own mother; the question was, whether the mother could take as heir to her son. It was determined by Sir *J. Jekyll*, M. R., that though a father or mother could not, as father or mother, inherit immediately after their son, yet if the case should so happen that the father or mother were cousin to the son, and as such his heir, they might take notwithstanding; and that here, though the heir was also mother, this did

(43) § 3.

(44) *Eastwood v. Pinke*, 2 P. Wms. 614.

not hinder her from taking in the capacity or relation of cousin.”

But now, as we have just seen, every lineal ancestor is made capable of becoming heir-at-law to any of his own issueless children.

12. As a consequence of the preceding canon, it follows as a rule that no brother or sister shall inherit immediately from his or her brother or sister, but every descent from a brother or sister must be traced through the parent.⁴⁵ Under the old law the descent between these relations was immediate, and the common ancestor was not named in tracing the pedigree. The consequence of now tracing through the parent, is, that the brother of the half blood of the last owner, where the father was the purchaser, will be entitled, as claiming through the father.

Sixth Canon.
—Brother
and sisters
trace through
their parent.

13. The mother of the more remote male ancestor is to be preferred to the mother of the less remote male ancestor.

Seventh
Canon.—Mo-
ther of the
more remote
female an-
cestor.

This is provided for by the 8th section of the Inheritance Act in the following language: That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants, and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants.

It was a vexed question with our old jurists and text

writers, whether the line of the father's mother, or that of the father's paternal grandmother, should be preferred : the controversy is now set at rest, for the above provision settles it in favour of the grandmother.⁴⁶

(46) We are informed by *Plowden* (Com. 450), in his report of the case of *Clere v. Brook*, that Mr. Justice *Manwoode* affirmed that the *former* line should be preferred ; and, in a note which is subjoined to his report of that case, he also tells us that he afterwards put the question to Mr. Justice *Manwoode*, in the presence of Mr. Justice *Harper* ; and, again, severally, to Mr. Justice *Mounson* and Sir *James Dyer*, and that they were all of opinion that the brother of the father's mother should first take ; though the reporter has, at the same time, taken care to add that many were of a contrary opinion ; namely, that the brother of the father's paternal grandmother ought to have been preferred.

The doctrine, however, of Mr. Justice *Manwoode* has been adopted by Lord *Bacon* (*Elements* I., p. 3 ; *Tracts* 37, edit. 1737), by Sir *Matthew Hale* (*Hist. Comm. Law*, 268, &c., edit. 1779), and by Lord Chief Baron *Gilbert* (*Ten.* 19) ; while the contrary position has been maintained by Mr. *Robinson* (*Law of Inherit. in Fee-simple*, ch. 6, &c.), and Mr. Justice *Blackstone* (2 *Comm.* 238, ch. 14).

The arguments of the latter writer, were, however, controverted by an anonymous author in a pamphlet which appeared in the year 1779, entitled, “Remarks on the Laws of Descent ; and on the reasons assigned by Mr. Justice *Blackstone* for rejecting, in his Table of Descent, a point of doctrine laid down in *Plowden*, Lord *Bacon*, and *Hale*.” In a note to a late edition of the Commentaries, Mr. Justice *Blackstone* was vindicated by Mr. Professor *Christian* ; and Mr. Professor *Christian* has, in his turn, been charged with inconsistency in his defence ; and the tenets, both of the author of the Commentaries and his annotator, have been again denied by the same anonymous writer, in another pamphlet which has recently made its appearance, under the title of “Remarks on the Inconsistency of the Table of Descents, projected by Mr. Professor *Christian*, in the twelfth edition of the Commentaries, with the doctrine laid down by Sir *William Blackstone*, and by every writer on the Law of Descents.”

Now it is indisputably laid down as law, *that, in the case of a purchase, the paternal line shall always be preferred to the maternal ; and that the heirs on the part of the mother shall never succeed till those on the part of the father be exhausted.*

That the father has two immediate bloods in him, viz. ; the blood of his father and the blood of his mother ; and

That a person taking lands by purchase in fee-simple, shall take them as a feud of indefinite antiquity.

These principles present a solution of this question, on which there has

14. Amongst the purchaser's collateral relations, the half-blood shall succeed next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male; and next after the common ancestor, where such common ancestor is a female.⁴⁷

Eighth Canon.—Precedency of the half blood; doctrine of possession of *fratris* annulled.

been such a contrariety of opinion, and, if the consequences of these principles be impartially and deliberately pursued, we shall, I think, be soon led to certainty on a point, as to which one would have supposed even ingenuity itself could not have suggested a doubt.

* * * * *

From what has been advanced, therefore, it should seem to follow inevitably that the brother of the paternal great-grandmother ought to be preferred in the succession to the brother of the paternal grandmother.

If, then, the proximity, which is the object of the law, be not an absolute proximity, but a proximity *sub modo*; if that proximity will admit of any modification, ought not the rule of proximity to be so modified as to render it compatible with the existence of axioms which have been never denied? Or ought we to sacrifice to this rule, rules which were never questioned, deductions which seem inevitably and indisputably to flow from those rules? If the brother of the paternal grandmother is to be preferred to the brother of the paternal great-grandmother, merely in compliance with this rule of proximity, what is to become of the rules—that the preference is due to the paternal line; that a *feudum novum* is to be held *ut antiquum*; that a person's blood is composed of that of both of his ancestors? And what is to become of that principle of common sense which teaches us that “the whole cannot be exhausted while one-half of it remains?”—Watkin's Descent, c. 3, where an elaborate discussion of the arguments on this now-settled question is pursued.

(47) There seems no sufficient reason for preferring the whole blood to the half blood, amongst collaterals in the ascending line: the preference was right enough as between brothers and sisters of the last owner, where he bought the estate, and was a purchaser in that sense; but in every other case, perhaps it would have been simpler and better to have abolished the distinctions between the whole and the half-blood, and more particularly as the act itself enlarges a man's capacity to take in the character of a purchaser. For if a man takes through his father by devise, which is now made to invest him with the character of a purchaser, the estate, on his death intestate, and without issue, will go to his sisters of the whole blood, in exclusion of the brothers of the half blood, and so in the ascending scale to his aunt of the whole blood, in preference to his uncle of the half-blood; whereas, if the estate had descended to him from his father, who was the purchaser (which, but for this statute it would have done, although devised to him), the brother of the half-blood would, under the act, have been pre-

This is entirely a creation of the Inheritance Act, since the half-blood, before it came into operation, would never inherit.⁴⁸ The section introducing this new canon is the ninth, which enacts :—“That any person related to the person from whom the descent is to be traced by the half-blood, shall be capable of being his heir ; and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half-blood on the part of the father, shall inherit next after the sisters of the whole blood, on the part of the father and their issue, and the brother of half-blood on the part of the mother shall inherit next after the mother.”

The admission of the purchaser's half-blood was a natural consequence of admitting the father to be his childless son's heir-at-law, seeing that such half-blood is the father's whole blood, who must succeed him.

The collaterals of the half-blood of a person last entitled, who was not a purchaser, will take in a course of descent from the purchaser of whose whole blood they are, by force of the direction that in every case the descent shall be traced from the purchaser. Suppose a deceased son purchased an estate, his sisters of the whole blood would come in before his brothers of the half-blood ; but if his father had purchased it, the sisters would be postponed to such brothers.

The doctrine of *possessio fratris* is at an end, for the half-blood cannot be excluded by such a possession.

ferred to the sisters of the whole blood, whilst the father's sisters of the whole blood would have taken before his brother of the half-blood.—2 Sug. Vend. & Pur. p. 237.

(48) The rule excluding the half-blood did not obtain on the descent of the Crown.

The maxim was *possessio Fratris de Feodo simplici facit Sororem Heredem*.

15. A descendant may now trace through an attainted ancestor; for “when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder, before the first day of January, one thousand eight hundred and thirty-four” (§ 10).⁵⁰

Descent flows through a person attainted as well as an alien.

(49) 3 Rep. 41. This was a consequence of the maxim *seisina facit stipitem*, and arose under the following circumstances: If a person, being seised of land, had issue a son and a daughter by one venter, and a younger son by another venter, and the father died, and then the eldest son entered and died, the daughter would have inherited the land as heir to her brother, who was the person last actually seised. But, if land, rent, an advowson, &c., descended to the elder brother, and he died before any entry by him made into the land, or before he received the rent, or presented to the church, the younger brother would have inherited, and not the sister of the whole blood: the reason being, that of all hereditaments in possession, the party claiming as heir must have made himself heir to him who was last actually seised.

(50) As to tracing descent through an alien, it was enacted by 12 & 13 Wm. III., c. 6, “That all persons being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king’s allegiance.” But inconveniences were afterwards apprehended in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis, the elder brother of John Stiles, be an alien, and Oliver, the younger son, be a natural-born subject, upon John’s death without issue, his lands will descend to Oliver, the younger brother: now if, afterwards, Francis has a child born in England, it was feared that under the statute of King William, the new-born child might defeat the estate of his uncle Oliver. Wherefore it is provided, by the Statute 25 Geo. II., c. 39, that no right of inheritance shall accrue by virtue of the former statute to any person whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised;

Conspectus
of the ancient
and modern
course of de-
scent at the
common law.

The following is a *conspectus*⁵¹ of a man's whole pedigree, which shows, by the Roman numerals, the stream of descent *before*, and, by the Arabic figures, the order of succession *since* the 1st January, A.D. 1834.

I.	1. Eldest Son.	} Descending Line.
II.	2. Second Son.	
III.	3. The Daughters.	
	4. Father.	Paternal ascending line.
IV.	5. Eldest Brother.	} Collateral Ancestors from the same two Parents.
V.	6. Second Brother.	
VI.	7. The Sisters.	

Paternal Ancestors. }	8. Only Brother of the half-blood from the Father.
	9. All the Sisters of the half-blood from the Father.
	10. Paternal grandfather.
VII.	11. Paternal uncles and aunts.
	12. Paternal uncles and aunts of the half-blood from the paternal grandfather.
	13. Paternal grandfather's father.
VIII.	14. Father's paternal uncles and aunts.
	15. Father's paternal uncles and aunts of the half-blood from the paternal grandfather's father.
	16. Paternal grandfather's paternal grandfather.
IX.	17. Paternal grandfather's paternal uncles and aunts.
	18. Paternal grandfather's paternal grandmother.
	19. Paternal grandfather's mother.
	20. Father's paternal uncles and aunts of the half-blood from the paternal grandfather's mother.
	21. Paternal grandfather's maternal grandfather.
X.	22. Paternal grandfather's maternal uncles and aunts.
	23. Paternal grandfather's maternal grandmother.
	24. Paternal grandmother.

with an exception, however, to the case, where lands shall descend to the daughter of an alien, which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule of descents by the common-law.

(51) It is taken from 1 Hayes's Conv. pp. 576, 577.

25. Paternal uncles and aunts of the half-blood from the paternal grandmother.
26. Paternal grandmother's father.
- XI. . . . 27. Father's maternal uncles and aunts.
28. Father's maternal uncles and aunts of the half-blood from the paternal grandmother's father.
29. Paternal grandmother's paternal grandfather.
- XII. . . . 30. Paternal grandmother's paternal uncles and aunts.
31. Paternal grandmother's paternal grandmother.
32. Paternal grandmother's mother.
33. Father's maternal uncles and aunts of the half-blood from the paternal grandmother's mother.
34. Paternal grandmother's maternal grandfather.
- XIII. . . . 35. Paternal grandmother's maternal uncles and aunts.
36. Paternal grandmother's maternal grandmother.
- Maternal }
Ancestors. }
37. Mother.
38. Only brother of the half-blood from the mother.
39. All the sisters of the half-blood from the mother.
40. Maternal grandfather.
- XIV. . . . 41. Maternal uncles and aunts.
42. Maternal uncles and aunts of the half-blood from the maternal grandfather.
43. Maternal grandfather's father.
- XV. . . . 44. Mother's paternal uncles and aunts.
45. Mother's paternal uncles and aunts of the half-blood from the paternal grandfather's father.
46. Maternal grandfather's paternal grandfather.
- XVI. . . . 47. Maternal grandfather's paternal uncles and aunts.
48. Maternal grandfather's paternal grandmother.
49. Maternal grandfather's mother.
50. Mother's paternal uncles and aunts of the half-blood from the maternal grandfather's mother.
51. Maternal grandfather's maternal grandfather.
- XVII. . . . 52. Maternal grandfather's maternal uncles and aunts.
53. Maternal grandfather's maternal grandmother.
54. Maternal grandmother.
55. Maternal uncles and aunts of the half-blood from the maternal grandmother.

56. Maternal grandmother's father.
 XVIII. . . . 57. Mother's maternal uncles and aunts.
 58. Mother's maternal uncles and aunts of the half-blood from the maternal grandmother's father.
 59. Maternal grandmother's paternal grandfather.
 XIX. . . . 60. Maternal grandmother's paternal uncles and aunts.
 61. Maternal grandmother's paternal grandmother.
 62. Maternal grandmother's mother.
 63. Mother's maternal uncles and aunts of the half-blood from the maternal grandmother's mother.
 64. Maternal grandmother's maternal grandfather.
 XX. . . . 65. Maternal grandmother's maternal uncles and aunts.
 66. Maternal grandmother's maternal grandmother.

(II.) Descent
by custom.

17. (II) Besides descent at the common law, there exists, in several places in England, peculiar customs, governing, in certain localities, the course of inheritance. The principal are (1) Gavelkind, (2) Borough English, and (3) Copy of Court Roll.

(1.) Gavel-
kind.

18. (I) Gavelkind⁵² land descends in the right line to all the sons equally as copartners, being an exception to the law of primogeniture. In default of sons, it then descends to the daughters in the ordinary manner.

It is to be remarked, that though females, claiming in their own right, are postponed to males, yet they may in-

(52) No legal term (not excepting the words "session" or "parliament") has more engaged the attention of legal antiquaries, or the speculations produced more profound learning, than the derivation of the word "gavelkind." It has been treated of as a subject by Camden, Spelman, Lambard, Coke, Somner, and Robinson, and has also received the deep consideration of many other profound and learned men, whose opinions upon this subject are divisible into two classes:—Firstly, those which are founded on the *nature of the land in point of descent*; and, secondly, those founded on the *nature of the services yielded by the land*; but without entering into a detailed disquisition on the merits of every individual of both classes, which would only tend to confuse, we shall be content, as to the first division, with stating the opinion of Lord Coke (1 Inst. 140 a) when he says, "Gavel-

herit together with males by representation. If, therefore, a man have three sons, and purchase lands held in gavelkind, and one of the sons die in the life-time of his father, leaving a daughter, she will inherit the part of her father; yet she is not within the words of the custom, *inter hæredes masculos partibilis*; for she is no male, but the daughter of a male coming in his stead *jure representationis*.

This custom extends also to the collateral line, for it has been resolved that where one brother dies without issue, all the other brothers shall inherit from him; and in default of brothers, their respective issue shall take *jure representationis*. But where the nephews succeed with an uncle, the descent is *per stirpes* and not *in capita*; and so from the nature of the thing it must be, where the sons of several brothers succeed, no uncle surviving, for though in equal degree, they stand in the place of their respective fathers.

kinde,—that is, ‘*Gave all kinde*,’ for this custom giveth to all the sons alike” This interpretation is clearly founded on the partibility of its descent, and, in this opinion he is followed by many. But the derivation which is generally received, and supported by most of the names already mentioned, is drawn from the *nature of the services*, and supposes that the term “gavelkind” is derived from the Saxon word “*gafol*,’ or as it is otherwise written, “*gavel*” which signifies “*rent*,” or a “*customary performance of husbandry works*,” and therefore the land which yielded this kind of service, in contradistinction to knight-service land, was called “*GAVELKIND*,” that is, “*land of the kind that yields rent*.”—Lambard (*Perambulations of Kent*, ed. 1656, p.585) first advanced and promulgated this supposition, and in opposition to the opinion of Lord Coke, which, until then, was the generally received one. Lambard’s arguments are these :—“It is well known that as knight service land required the presence of the tenant in warfare and battle abroad, so this land, being of socage tenure, commanded his attendance at the plough, and other the lord’s affairs at home; the one by manhood defending his lord’s life and person, the other by industry maintaining with *rent, corn, and victual*, his estate and family.” That Gavel-kind denoted the *tenure* of the land only, and not the partibility or other customary qualities accidental to the custom, if not sufficiently evidenced above, is altogether proved by an attention to the ancient charters contained in Somner’s App. p. 184, where, in an inquisition of lands and tenements which Isabella of

The partible quality of *gavelkind* extends also to estates-tail, for if a person die seised in tail of lands held in *gavelkind*, all his sons shall inherit together as heirs of his body.

Since the 1st January, A.D. 1834, the half-blood shall inherit, the Inheritance Act, § 9, extending to this custom ; for it applies to land of every tenure (§ 1).

The other special customs of this tenure are (1) that a wife is dowable out of one-half, instead of one-third of the land ; (2) that a husband will be tenant by the courtesy, whether there be issue born or not, but only of one-half so long as he remains unmarried ; (3) that *gavelkind* lands are not liable to escheat for felony,⁵³ although they are for treason or want of heirs ; and (4) that an heir in *gavelkind* at fifteen years may make a contract and sell his estate for money ; but the livery upon the feoffment (the only deed which can be adopted) must be made by the heir in person ; for, being under age, he cannot, by the common law, appoint an attorney.

Gavelkind, before A.D. 1066, was the general custom of the realm ; the feudal law of primogeniture superseded it. It was retained in Kent, because, according to the historical legend, the Kentish men surrounded William I. with a moving wood of boughs, just after the slaughter at Has-

Monte Alto held of the Prior of Christ Church, Canterbury, it is stated that "*quod prædicta Isabella tenuit in Gavelikinde* ;" also at page 180 of the same work, in a charter of lands to be held in *gavelkind*, the tenendum is, "*tenendas (viginti acras) de nobis ad Gavelikinde*." These expressions go directly to the point, and which, though often used previously to the statute *quia emptores*, 18 Edw. I. (at which period any tenure might be created at the pleasure of the grantor or donor), yet after that statute we find no trace of their use. These are, therefore, strong and unanswerable authorities in support of the opinion embraced, the *tenendum* being that part of deeds, or as they were then styled, *charters*, instituted for the insertion of the tenure by which the lands conveyed should be held.

(53) The maxim being—"The father to the bough, the son to the plough."

tings, and thus obtained a confirmation of their ancient rights.

By 34 and 35 Hen. VIII. c. 26, all *gavelkind* lands in Wales were made descendible to the heir, according to the common law; by which it would appear that the tenure likewise obtained in that principality.

And even in Kent, lands belonging to various persons have been disgavelled by statute, especially the 31 Hen. VIII., c. 3, and made descendible according to the course of the common law. This can be only effected by act of parliament. Gavelkind is met with occasionally in a modified form in copyholds.

Primâ facie all land in Kent is taken as gavelkind, except those which are disgavelled by particular statutes, which should always be noticed in transactions relating to Kentish property. This law, then, is never pleaded, but presumed, and the courts are bound to take judicial notice of it.⁵⁴

19. (2) Borough-English, or Postremo-geniture. This (2.) Borough-English, or postremo-geniture. is a custom occasionally met with in some boroughs, whereby if a person have many sons and then die intestate, the youngest son⁵⁵ shall inherit all the realty which

(54) 1 Mod. 98.

(55) The principles upon which the custom is founded are lost, but a descent almost similar is shewn in the Welsh laws, as compiled by Hœl Ada, in the 10th century, by which it appears the youngest son had the principal *tyddyn* (tenement) and all the buildings of his father's, and eight *erws* of land. Blackstone supposes the custom was derived from the Tartars, amongst whom, according to Father Duhalde, this custom of descent to the youngest son also prevails—the nation being composed of herdsmen. The sons, as soon as they attain the proper age, migrate from the paternal residence, with an allotment of cattle, and seek elsewhere a home. The youngest son, who continues with the father, is naturally the heir of his house, the others having been already provided for. He says that this custom may be a remnant of that pastoral state of our German and British ancestors, described by Tacitus and Cæsar. This supposition contrasts favourably with the speculations of other authors, particularly of Buchan, who endeavours to identify its institutions with the custom of Marcheta, or the right

belonged to his father situated within such borough. A posthumous son dispossesses his elder brother. The custom is found in freeholds and copyholds, but without any legal differences. The right of representation exists with this custom, for, should the youngest son die in his father's life-time, leaving a daughter, she will inherit the property.

This custom extends to estates-tail, but not generally (as gavelkind does) to the collateral descent, so that where lands held in borough-English descended to the youngest son, and he died without issue, it was resolved that they did not go to the younger brother, for the custom did not take place in the descent between brothers, but the eldest brother inherited, unless a special custom expressly extended it to the collaterals.

A custom is often annexed to lands in borough-English,

of concubinage, which the lord had with his tenant's wife on her wedding night. There is no evidence of this custom having existed in England, though it is known to have prevailed in Scotland until abolished by Malcolm III. (Reg. Mag. 1, 4, c. 31), who commuted it for a fine, payable on the marriage of his tenants, which payment is termed, to this day, *Marcheta*. Littleton is also of the opinion of Blackstone: he says, "that it is because the younger son, because of the reason of his tender age, may be least able to help himself." Robinson, (*Gavelkind*, App. 388,) in sanctioning Littleton's opinions, says, he is persuaded this reason is the true one when he considers in what places the custom prevails: for the most part, it is in ancient boroughs or copyhold manors. In the former was exercised the little trade that was then in the kingdom, and which was barely sufficient to obtain a competent maintenance or a convenient habitation; it was therefore impossible for the trader to bring up his children in idleness, so, as they grew up, he sent them into the world with a sufficient portion of his goods to enable them to acquire a living by their own industry. Glanvil (l. 7, c. 9) says, the old law was very indulgent to the son of a burgess, supposing him to be of age when he could count money, measure cloth, or manage his father's business of a like nature; but as the youngest son was last in turn, he was the child, if any left, unadvanced at his father's death, therefore custom directed the descent of the real estate to him.

This custom obtains in the manor of Lambeth, Surrey, in the manors of Hackney, St. John of Jerusalem in Islington, Heston and Edmonton in Middlesex, and in other counties.

that the widow shall have all her husband's lands in dower, and the power of devising, in order that she may the better provide for the younger children, with the care of whom she is intrusted. These customs are special, and not properties of the general custom, which should be borne in mind, as many authors have treated them as integral parts of borough-English.

Borough-English, like gavelkind, the law takes particular notice of; there is no occasion, therefore, to prove that such custom actually exists, but simply that the lands in question are subject thereto. The extension, however, of the custom to the collateral line must be specially pleaded.

This custom, like gavelkind, cannot be altered by any limitation of the parties; therefore, where A., seised in fee of lands held in borough-English, made a feoffment to the use of himself and the heirs male of his body, according to the course of the common law; the words "according to the course of the common law," were held void; for customs, which go with the land, and fix and order the descent of inheritances, can only be altered by act of parliament.

20. (3) Copy of Court-Roll. Where inheritable lands are thus held, the descent is according to the particular custom of the particular manor, and when this differs from the common law, the custom is construed strictly, and must be expressly pleaded, for the courts do not take judicial notice of it. The right of representation obtains in the descent of copyholds. (2.) Copy of court-roll.

As to copyhold and customary lands, the Inheritance Act (3 & 4 Wm. IV., c. 106,) does not change the descent, which is governed by the particular custom, except so far as its enactments are applicable to them in com-

mon with freehold fees, *ex. gra.*, the half-blood are now admitted.

(111.) De-
scend of en-
tails.

21. (III) There is one species of descent, which remains to be noticed,—the descent of estates-tail by statute.

This succession is not at all meddled with by the Inheritance Act: it depends altogether upon the statute *De donis conditionalibus* (13 Edw. I., c. I.) which indeed created this kind of inheritable freehold.

The donee of an estate-tail is the first purchaser of it, and none save those who are lineally descended from him, and answer the limitation general or special, can inherit it *per formam doni*. But primogeniture amongst the males, and coparcenary amongst the females who are not excluded in the original gift, exist, and a posthumous child is not prejudiced by reason of his coming after prior children.

In tracing descent, then, to an estate-tail, the maxim *seisina facit stipitem* never applied, for the issue are as much within the donor's intention, and as personally and precisely described in the gift as any of their ancestors; and consequently the half-blood is not excluded, since the issue in tail is ever of the whole blood to the donee; neither does the rule of *possessio fratris* obtain. The descent of an estate-tail, was never interrupted by attainder for treason, there could be no corruption of blood, for the issue in tail claim *per formam doni*.

Tenants in tail now so generally bar the entail, and convert their estates into fee-simples, that the question of descent seldom arises in these interests.

Proofs to es-
tablish an
heirship.

22. In order to establish the fact of heirship, it is necessary to prove (1) the relationship to "the purchaser," and (2) the failure of issue from such branches as would otherwise impede the descent, should any persons intervene between "the purchaser" and the alleged heir, which would happen when he is presumptive heir only.

To prove relationship between A. and E., supposing C. to be the common ancestor, and D. and E. to be his son and grandson in the one line, and B. and A. to be his son and grandson in the other, the direct course would be to prove the marriage of C., and that B. and D. were his legitimate children, which may be effected by direct proof, or by copies from the registers, with evidence of identity, or by general reputation where direct proof cannot be had; and also the marriages of B. and D., and that A. and E. were respectively the issue of these marriages, which may be proved by the testimony of members of the family, or of those conversant with it, or by reputation, or by declarations,⁵⁷ either written or oral, of deceased members of the family. Proof is requisite of the deaths of E. and B., and also that B., C., D., and E. had no issue, which would take in preference to A., or if they had, then to show the failure of issue by negative evidence.

A declaration as to pedigree, if made *post litem motam*, that is, after the commencement not merely of the litigation, but of the controversy, is not admissible. It is not necessary, in order to the exclusion of the evidence, to show that the *lis mota* was known to the person who made the declaration. After the controversy has originated, all declarations are to be excluded, without regard to the knowledge of the witness; for if an inquiry were in each case to be instituted, whether the existence of the controversy were or were not known at the time of the declaration, much time would be wasted and great confusion produced.

In deducing a title to a purchaser, it is usual, unless where such fact may happen to be disclosed by recitals in

(57) To warrant the admission of declarations relating to pedigree, it is essential, 1st. That the parties who made the declarations be proved to be dead at the time of the trial, otherwise they are not *the best evidence*; 2ndly. That the declarants were likely to know the facts. The tradition must

old deeds, executed twenty or thirty years back, to require some satisfactory evidence of the death and failure of issue capable of inheriting of every person through whom the title must be deduced. And therefore each succeeding owner of an estate, where there is a probability of a reversion, or other interest descending to a member of his family, ought, by regular entries in the family Bible or otherwise, from time to time, of marriages, births, and deaths, to perpetuate the evidence of those events.⁵⁸

*Lex loci rei
sitæ governs.*

23. The principle of International Law, which obtains in our country relative to the descent of unwilled realty, is, that the law of the nation or state within which the property is situated, exclusively governs the line of pedigree. The succession, then, being governed according to the *lex loci situs*, the persons also who are to take by succession can be ascertained only by reference to the same law. This doctrine of the common law is indisputable in England.⁵⁹

therefore be derived from persons so connected with the family, that it is natural and likely, from their domestic habits and connexions, that they are speaking the truth, and that they could not be mistaken. Lord Eldon observed (*Whitelock v. Baker*, 13 Ves. 514) that "declarations in a family, descriptions in wills, inscriptions upon monuments, in bibles, and registry-books, are all admitted, upon the principle that they are the natural effusions of a party who *must know the truth*, and who speaks upon an occasion when the mind stands in an even position, without any temptation to exceed or fall short of the truth." Hearsay and reputation are admitted in evidence in cases of pedigree; and it is usually found that the evidence of perhaps one old, intelligent witness (especially if a female, whose knowledge and memory on the subject are generally most acute), will dispense with the necessity for any other proof, though it is certainly advisable to have in court copies of the registers of marriages, births and burials, ready to be proved by a witness who has examined the same with the originals, so as to assist or corroborate the witness as to deaths and other facts. 1 Chit. G. P. c. iv., 278.

(58) Chit. Gen. Prac., c. iv., p. 277.

(59) Foreign jurists generally, though not universally, maintain the same doctrine; and accordingly hold, that in cases of succession, *ab intestato*, we are to ascertain the persons who are to take the inheritance by the *lex loci rei sitæ*, whether the question respect legitimacy, or primogeniture, or right of representation, or proximity of blood or next of kin.—See further on this interesting subject, Story's Conflict of Laws, c. xii., § 483, *et seq.*

CHAPTER III.

PRESCRIPTION OR NON-CLAIM.

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| <ol style="list-style-type: none"> 1. Described. 2. Its two kinds. 3. Its differences from custom. 4. <i>Negative</i> prescription. 5. Policy of the law of limitation. 6. The 3 & 4 W. 4, c. 27, which gives the rule as to land and rent. 7. Exceptions to the rule ; extreme period. 8. When the right first accrues. 9. Some rules to ascertain its accrual. 10. Bar of estates expectant upon entails. 11. Proceedings in Chancery. 12. Mortgages ; the 7 W. IV. and 1 V., c. 28. 13. Spiritual property, &c. 14. Charges, legacies, and dower. 15. Arrears of rent and interest. 16. Preservation and extinction of the ownership. | <ol style="list-style-type: none"> 17. <i>Positive</i> prescription, with its common law rules. 18. The 2 & 3 W. IV., c. 71. 19. As to rights of common and other profits <i>à prendre</i>. 20. As to ways, other easements, or watercourses, &c. 21. As to the use of light. 22. The periods, how calculated. 23. As to pleadings and evidence. 24. Presumption exploded. 25. Disabilities. 26. The 2 & 3 W. IV., c. 100, as to tithes. 27. What tithe-compositions are valid. 28. To what cases the act does not extend. 29. The periods excluded. 30. As to allegations in actions. 31. Presumption for any lesser periods not allowed. 32. The 4 & 5 W. IV., c. 83. |
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1. Title by Prescription arises from a long-continued Described. and uninterrupted possession of property, and is thus defined by Sir Edward Coke⁶⁰—*præscriptio est titulus, ex usu et tempore substantiam capiens, ab auctoritate legis*.

2. There are two kinds of prescription⁶¹ viz. : — (1) *negative* Its two kinds. which relates to realty or corporeal hereditaments, whereby an uninterrupted possession for a given time gives

(60) 1 Inst. 113 b.

(61) Every species of prescription, by which property is acquired or lost, is founded on this presumption, that he who has had a quiet and uninterrupted possession of anything for a long period of years, is supposed to have a just

the occupier a valid and unassailable title, by depriving all claimants of every stale right and deferred litigation, now mainly governed by 3 and 4 Wm. IV., c. 27; and (2) *positive*, which relates to incorporeal hereditaments,⁶² and originated at the common law from immemorial or long usage only. Positive Prescription is sub-divided into (1) that which has been exercised by a person and his ancestors, or by a body corporate and their predecessors, and is a personal right; or (2) that which has been attached to the ownership of a particular estate, and is only exerciseable by those seised of such estate, technically denominated a prescription in a *que* estate.

Positive Prescription has been greatly modified by the statutes 2 & 3 Wm. IV., c. 71; 2 & 3 Wm. IV. c. 100; and 4 & 5 Wm. IV., c. 88.

Its differences
from custom.

3. Prescription and custom are frequently confounded in common parlance, arising perhaps from the fact that immemorial usage was essential to both of them; but, strictly, they materially differ from one another, in that, custom is properly a local, impersonal usage, such as Borough-English, or postremo-geniture, which is annexed to a given estate, while prescription is simply personal, as that a certain man and his ancestors, or those whose estate he enjoys, have immemorially exercised a right of pasture-common in a certain parish. Again, prescription has its origin in a grant, evidenced by usage, and is allowed on account of its loss, either actual or supposed,

right, without which he would not have been suffered to continue in the enjoyment of it. For a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants; and that acquiescence also supposes some reason for which the claim was foreborne. 1 Cruise's Dig., Tit. xxxi. "Prescription," c. i. § 4, p. 421.

(62) Incorporeal hereditaments are rights issuing out of things corporeal, or concerning, or annexed to, or exerciseable within the same. They are advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, or pensions, annuities, and rents.

and therefore only those things can be prescribed for which could be raised by a grant previously to 8 and 9 Vict. c. 106;⁶³ but this principle does not necessarily hold in the case of a custom.

4. We will first address ourselves to negative prescription, as influenced by statute. Negative prescription.

The 3 & 4 Wm. IV., c. 27, for limiting actions,⁶⁴ and suits in relation to realty, has much simplified the common-law rule as to undisturbed possession,⁶⁵ and abolished a heap of technical and obscure learning.

(63) By the second section of this statute, all kinds of property may now be conveyed by a deed of grant.

(64) It abolished all real actions, except dower, dower *unde nihil habet*, and *quare impedit*, and plaints for dower and free-bench, and all mixed actions, except ejectment. See §§ 35, 37, and 38.

(65) "We say," observed Lord Wynford in *Benest v. Pipon*, 1 Knapp, p. 60, *et seq.*, "on the authority of the commentators on the civil law, that the right, which is to be supported by prescription, must have existed beyond the memory of man. They (Domat, *Lois Civiles*, lib. 3, tit. 7, § 4) have fixed on the term of thirty years, as exceeding that period. Our law has carried the time of legal memory back to the return of Richard I. from the Holy Land. The sort of possession that is required to establish a prescription is the same in the civil law, the law of Jersey, and our common law. Whoever indeed will take the trouble to read Bracton and our early writers on the common law, will be surprised to find the number of doctrines they have adopted, and even whole passages they have transcribed, from the civil law.—(Domat, lib. i, tit. 12, § 1, *in notis*. Bracton, fols. 52 & 222 b.) The possession must be maintained without force; it ought not to be a secret or precarious possession; it must be a "*possessio longa, continua et pacifica, nec sit legitima interruptio*." Lord Coke has translated from Bracton the three first words of this passage in his description of the possession necessary to support a prescription, by saying it must be "long, continued, and peaceable."—(Co. Litt. 113. b.) This is precisely what is said of prescription by the commentator on the laws of Normandy, which are those of Jersey. The Code Napoleon makes use of nearly the same expressions on this subject.—"*Code civil*, liv. 3, tit. 20, article 22, 29. *Pour pouvoir prescrire il faut une possession continue, et non interrompue paisible, publique et a titre de propriétaire.*" We agree with the counsel for the respondents, that a claim is not interrupted by trespasses, if the trespassers are not known by the claimant; but if the supposed trespassers are known, if the supposed trespasses frequently happen, and no legal proceedings are instituted in consequence of them, they then

Policy of the
law of limita-
tion.

5. Upon the general policy of the Law of Limitation, which regards the quietude of the owner, and the vigilance of the occupants, as well as the peace of society at large, Lord C. *Eldon*, thus expressed himself in the House of Lords, upon giving judgment in *Cholmondeley v. Clinton*⁶⁶ :—

“All the Statutes for Limitation of Actions, are statutes expressly made for the purpose of quieting possession; and that is the great object of the policy of those statutes. It is generally immaterial to the public at large, whether A. or B., is the owner of a particular estate; but it is highly important to the public at large, that the person who is in possession should be the owner, for he is dealt with by all men as the owner, they seeing that he is in possession, and therefore it is a consideration of public policy. The Statutes of Limitation are not simply for the purpose of quieting rights between individuals, but they are founded upon public policy, that the person who is in possession, having the credit attributed to that possession, his possession should not be lightly disturbed.”

In *White and another v. Parnter and another*, on appeal from Jamaica to the Privy Council, A.D., 1829, the policy and reasons of the Statutes of Limitation are thus explained by Lord *Wynford* :—⁶⁷

“Until lately the judges at Westminster-hall took a narrow view of the spirit of the statutes of limitation. They considered those statutes were only intended to protect persons, who, having paid their debts, were liable to be called on to pay them a second time, in consequence of the loss of vouchers. Any allusion to the existing debt (although not amounting to a promise to pay it) was held to keep alive the right of action for the recovery of it. A

become the “*legitimæ interruptiones*” which Bracton speaks of, are converted into assertions of right.”

(66) 4 Bligh's Reports, Pt. 1, p. 117, o.s. A.D. 1821.

(67) 1 Knapp's Priv. Coun. Reports, p. 226, *et seq.*

cunning person could easily draw from an ignorant debtor just such an allusion as would satisfy the courts, and no more; or if by chance some explanation or qualification accompanied the allusion, these were forgotten, and the allusion only was proved. It was almost impossible that any one could be called to contradict the witness in support of the claim. The protection which the statutes intended to give was thus entirely taken away. The courts of law have now overturned the early decisions, as being contrary to the words and spirit of the act;⁶⁸ and the legislature has gone further than the courts of law could, by declaring that no verbal promise should prevent a claim from being barred by the statutes of limitation.⁶⁹

“The statutes of limitation are laws of peace and justice; when property has been so long in the possession of a family, that it has passed to the children and grandchildren of those who first acquired it, and they, unconscious of any defect of title, have formed their habits and plans of life according to the income that the property produces, it would be cruel to deprive them of it. The members of the family from which it came (never having enjoyed it,) suffer but little from its loss. After a great lapse of time it is impossible to get at truth so as to do justice upon any case. You have some documents, but you may not have all that relate to the title, and those which are lost might have explained or perhaps done away entirely the effect of those which remain. Although some documents may be preserved, the witnesses necessary to make the account of the transaction complete and fit for a decision, cannot. These were the reasons why the legislature passed the statutes of limitation, and they bear

(68) See the late determination in *A'Court v. Cross*, 11 Moore, p. 198; and 3 Bing. 329, and *Tanner v. Smart*, 6 Barn. and Cress. 603, in which the earlier cases on the subject are all collected and reviewed. See also Phillips on Evidence, Vol. 2, c. 10, p. 138, seventh edition.

(69) 9 Geo. IV., c. 14.

directly on the present case. Those whom the appellants represent have been in possession since 1781: no one, from the year 1791 to the year 1822, pretended to have any claim on the property. That the parties to the original transaction were long since dead, we know from the papers in the cause. It is most probable that all their clerks and agents are also dead; there is therefore no one who can give an explanation of any paper that may be produced, or show under what circumstances it was written.

* * * * *

“The Court of Chancery has adopted the limitations which have been imposed on legal remedies; and wherever a Court of Common Law will presume that a debt is satisfied, unless there be some circumstance to rebut this presumption, a Court of Equity will act on the same presumption. If nothing has been done under a judgment for twenty years, a Court of Common Law will presume that it is satisfied.

* * * * *

“But it has been said that, as the mortgagee has within twenty years, acknowledged the existence of the mortgage, the mortgagor has, on account of such acknowledgment, a right to sue for the redemption of the estate; and that this annuitant, whose claim is against the equity of redemption, has a right, as the mortgagor does not object to it, to claim through his side against the mortgagee. If so, every legatee of the mortgagor must have the same right of insisting that the mortgage debt is satisfied, and of calling on the mortgagee to give him an account of the proceeds of the estate from the time of the death of the mortgagor, a period of about fifty years. If creditors or legatees of the mortgagor had the right of calling mortgagees to separate accounts, every mortgagee would be liable to be ruined by the different suits that might be instituted against him; but from the principle laid down

in the case of *Troughton v. Binkes*,⁷⁰ and the cases referred to by the Master of the Rolls in his judgment in that case, I think the mortgagor or his heirs only can sue the mortgagee for an account and redemption, unless it can be shewn that they and the mortgagee are in collusion to prevent creditors or legatees from recovering what is due to them from the mortgagor's property. There is no charge of such collusion in this bill, nor is there any pretence for supposing any such collusion in the present case."

The decree in the Court below was reversed without costs.

6. Having shewn the policy of the Law of Limitation, let us exhibit the provisions of the several statutes which have been passed for the ultimate repose of litigation connected with realty.

The 3 & 4 W. 4, c. 27, which gives the law as to land and rent

The period within which to contest disputes concerning land and rent is thus fixed by 3 & 4 W. IV., c. 27, § 2: "That after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land⁷¹ or rent⁷² but within *twenty years* next after the time at which the right to make such entry or distress, or to bring such action⁷³, shall have first accrued to some person through whom he claims, or, if such right

(70) 6 Ves. 572.

(71) The word "*land*" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel-interest, and whether freehold or copyhold, or held according to any other tenure. (§ 1.)

(72) The word "*rent*" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); (§ 1.)

(73) By § 39, no descent-cast, discontinuance, or warranty, shall toll or defeat a right of entry and action.

shall not have accrued to any person through whom he claims, then within *twenty years* next after the time at which the right to make such entry or distress, or to bring such action, shall have *first* accrued to the person making or bringing the same.”

It was ruled, in *Grant v. Ellis*,⁷⁴ that this section does not apply to a rent incident to a reversion expectant on the determination of a common lease for years, but only to a freehold rent, or an annuity, which is a charge upon land,⁷⁵ and which is susceptible of having an estate or interest in it. The discontinuing, therefore, to receive rent for more than twenty years, where there is a lease, does not affect the right to recover the arrears of rent.

Exceptions
to the rule;
extreme
period.

7. This then is the broad rule, to which, however, there are the following important exceptions:—

The first is a temporary one, viz., that where the possession was not adverse at the time the statute passed, then the right should not be barred until five years after its passing (§ 15).

The second relates to personal disabilities, by providing “that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have *first* accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say), *infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas*, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or rent at any time within *ten years* next after the time at which the person to whom such right shall first have accrued as

(74) 9 Mee. & Wel. p. 113, *et seq.* (Exch. Nov. 9, 1841).

(75) *Paget v. Foley*, 3 Scott, 135; 2 Bing., N. C., 688; also *James v. Salter*, 2 Bing., N. C., 544; 4 Scott, 168.

aforesaid, shall have ceased to be under any such disability, or shall have died (which shall have first happened.") § 16.

But the extreme period of limitation is fixed by § 17, enacting:—"That no entry, distress, or action, shall be made or bought by any person who, at the time at which his right to make an entry, or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within *forty years* next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such *forty years*, or although the term of *ten years* from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

"It should be kept in view," observes Sir E. Sugden, "that forty years are not a bar against all the world. The twenty years form the regular bar, and the savings are the exception, and the forty years run only in the case of disabilities, in even which case not more than forty years are allowed; but the twenty years run only from the time when the right first accrued, and that in the case of a remainder, for example, is not until it falls into possession, which event, in the common case of an estate for life, with a remainder over, may not happen within forty years of its creation."⁷⁵

A succession of disabilities will not prevent the statute barring the right and remedy; for "when any person shall be under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover

such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person. (§ 18.)

No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be *beyond seas*, within the meaning of this act. (§ 19.)

When the
right first
accrues.

(8.) The time when the right shall be deemed to have first accrued is thus provided for by § 3, in five express instances.

(1.) As to estates *once* in possession ;—

“When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.” Desertion, then, and non-occupation, for twenty years or upwards, wholly unexplained, would seem to operate as a bar to recovery against a present adverse possession. The question will be whether twenty years have elapsed since the right accrued, whatever be the nature of the possession.

(2.) As to estates in possession devolving on the owner's death to his heir-at-law, or devisee :—

“When the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt, in respect of the

same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death."

(3.) As to estates in possession created by alienation, *inter vivos*;—

"When the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person, being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument."

(4.) As to estates which have never been in possession;—When the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

(5.) On forfeitures and breaches of condition;—“When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken.” (§ 3.)

“We are all clearly of opinion,” observed Lord *Denman*,⁷⁷ “that the second and third sections of this act (which came into operation on the 1st January, 1834) have done away with the doctrine of non-adverse possession, &c., except in cases falling within the fifteenth section of the act (which, being but temporary, is now of no moment), the question is, whether twenty years have elapsed *since the right accrued, whatever be the nature of the possession.*”

It is to be observed, that though the right of entry on forfeiture or breach of condition be barred, yet the person so entitled to enter, has still his right to enter at the regular period, as preserved to him by § 4, for no person is required to anticipate the regular period of possession. So that expectants have two periods whence they may claim: (1) when a forfeiture arises, or (2) when the expectant becomes a possessed estate.

Some rules to ascertain its accrual.

9. The six following sections of the act make rules for ascertaining when this right accrues, where no disability exists.

(1.) As to an expectant not taking advantage of a forfeiture, he shall have a new right when his expectancy comes into possession. “When any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or being an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest at the time when the same shall have become an estate or interest in

(77) *Nepcan v. Doc d. Knight*, 2 M. & W. 895.

possession, as if no such forfeiture or breach of condition had happened.” (§ 4.)

(2.) A reversioner has a new right on coming into possession, though formerly possessed. “A right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.” (§ 5.)

(3.) An administrator to claim, as if no interval had accrued after the intestate’s death. “For the purposes of this act,⁷⁸ an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.” (§ 6.)

(4.) A right, subject to a tenancy at will, is deemed to have accrued at its determination, or one year from its commencement. “When any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an

(78) The general rule is that the Statute of Limitations only begins to run from the grant of the letters of administrations, as to rights accruing after the intestate’s death, which is superseded as to this particular statute, but still obtains in other cases, as in an action on a bill of exchange by an administrator.

action to recover such land or rent, shall be deemed to have first accrued, *either* at the determination of such tenancy *or* at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always that no mortgagor or *cestui que* trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee." (§ 7.)

(5.) But, if subject to a tenancy from year to year, then to accrue at the end of the first year, or last payment of rent.

"When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years, or other periods, or at the last time when any rent payable in respect of such tenancy, shall have been received (which shall last happen)." (§ 8.)

(6.) Where a rent amounting to twenty shillings or upwards, received by a written lease, shall have been wrongfully received, no right to accrue on such lease's determination, but only at the time of the rent's wrongful receipt.

"When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards, shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall

afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled." (§ 9.)

The receipt of rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him, (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act. (§ 35.)

10. With regard to entailed estates, with remainders or reversions expectant thereon, the following provisions are important :

Bar of estates
expectant
upon entails.

"When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action, shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred." (§ 21.)

"When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but

within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action.” (§ 22.)

These sections then provide that adverse possession against a tenant in tail shall extend to his own issue, and all remainders and reversions over, which he might have defeated by cutting off the entail,—treating him, in fact, as the owner of the fee-simple.

The next section relates to possession under a defective conveyance by a tenant in tail.

“When a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.” (§ 23.)

Thus time gives legal efficacy to the assurance executed by the tenant in tail.⁷⁹

(79) The clause is framed with reference to the new plan of assurance introduced by the Fines and Recoveries Abolition Act (3 & 4 Wm. IV.,

11. The time limiting suits in Equity, is fixed in analogy to the legal limitation, for “after the 31st December 1833, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same, as he shall claim therein in equity.” (§ 24.)

Proceedings
in Chancery.

When, however, “any land or rent shall be vested in a trustee upon any *express trust*, the right of the *cestui que* trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.” (§ 25.)

The limitation as to fraud is thus distinguished: “In every case of a *concealed fraud*, the right of any person to bring a suit in equity for the recovery of any land or rent, of which he or any person through whom he claims, may

c. 74), to which it plainly refers, and there is no objection in point of law to an earlier statute operating on a later. The effect of the clause, therefore, is that where tenant in tail executes a deed enrolled under the 3 & 4 Wm. IV., c. 74, which, for want of the consent of the protector, operates only to create a base fee, under which possession is obtained, the title will become good against those in remainder at the end of twenty years from the period when the tenant in tail, or his issue, could, without the consent of any third person, have barred the ultimate remainders by virtue of the substitution for Recoveries Act. But this operation will not be effected if the assurance already executed would not, if then executed without consent, have operated to bar the estates in remainder. It will be necessary therefore, in all such cases, to ascertain that the assurance was duly made and enrolled.—2 Sug. V. & P. p. 357.

have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been *first known or discovered*: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in Equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed.” (§ 26.)

The jurisdiction of Equity is, in certain cases, saved, since “nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief *on the ground of acquiescence or otherwise*, to any person whose right to bring a suit may not be barred by virtue of this act.” (§ 27.)

“As often as Parliament,” observed Lord *Camden*,⁸⁰ “has limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the legislature has fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance *laches* beyond the period that law had been confined to by Parliament. And therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar.”

12. The time of limitation is now fixed as to transactions between mortgagor and mortgagee:—

Mortgages;
the 7 W. IV.,
and 1 Vict.,
c. 28.

(80) *Clay v. Clay*, 3 Bro. C.C. 639 n.

“When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgement of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him ; and in such case no such suit shall be brought, but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgements, if more than one, was given.”

And “when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons.”

But “Where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual *only* as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors, a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent.”

And “Where such of the mortgagees or persons afore-

said as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.” (§ 28.)

An apprehension having been started⁸¹ whether a mortgagee, who should omit to enter within twenty years from the day of default in the repayment of the loan, although the mortgagor regularly paid the stipulated interest thereon, would not be barred under the 2nd and 3rd sec. of this act, the following act—7 Wm. IV., and 1 Vict., c. 28—was passed to dissipate it :—

“Whereas doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled “An act for the limitations of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto,” so far as the same relates to mortgages ; and it is expedient that such doubts should be removed : be it declared and enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act,⁸² to make an entry or bring an

(81) In *Doe v. Williams*, 5 Adol. & Ell. p. 297.

(82) See p. 543, note (71), *ante*.

action at law, or suit in equity, to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest, secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued, anything in the said act notwithstanding.”⁸³

13. Spiritual and eleemosynary corporations sole are limited to recover land or rent within two incumbencies, and six years, or within sixty years (whichever may be the longer period of the two) next after their right of entry accrue (§ 29); and no advowson to be recovered by *quare impedit* or otherwise, after three adverse incumbencies, or sixty years (whichever may be the longer) (§ 30); incumbencies after a lapse to be reckoned within this period, though not incumbencies after a promotion to a bishopric (§ 31). And when a person claims an advowson expectant after an estate tail, which the tenant in tail might have barred, the time that runs against the tenant in tail will also be counted against the expectant (§ 32). The extreme period of limitation in the case of an advowson is limited to one hundred years, “unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the

Spiritual
property, &c.

(83) Whether a person would be compelled to take a title gained under the Statute of Limitations by a long possession by a mortgagee without acknowledgement, is not clear. The objection to it is, that the fact upon which its validity depends, namely, the non-recognition of the mortgage debt, is not susceptible of positive proof, and there may have been disabilities in the mortgagor, keeping alive the right of redemption. There is, consequently, ground to contend, that the case falls within the principle upon which it has been held, that a conveyance by a trader, after an act of bankruptcy, cannot be forced on the acceptance of a purchaser, although it is asserted that he owed no debt on which a petition for adjudication could be filed, it being impossible to prove the fact.—1 Sweet's Jarm. Bythe, p. 66. But see *Cooper v. Emery*, 1 Hayes's Introd. p. 274; and *Stephens v. Brydges*, 6 Mad. 6

person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title." (§ 33.)

Charges, legacies and dower.

14. No action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given. (§ 40.)

"It seems," says Sir Edward Sugden,⁸⁴ "to have been assumed that the statute relates to legacies out of personal estate, as well as to those charged upon the land. The real property commissioners, in their first report, state no such intention, and the statute itself is ambiguously framed in this respect. This clause provides for the case of legacies, and a subsequent clause provides for interest upon legacies. The title and general frame of the act confine its provisions to real estate, and this very clause first provides for any sum of money *secured* by mortgage, &c., *out of any land or rent*, 'or any legacy.' If this had been so intended, undoubtedly in such bill it should

(84) 2 Sug V. & P. p. 363.

have been expressed, in opposition to the previous case, 'whether charged upon real or personal estate.' This is followed by a provision as to *arrears* of dower, which is succeeded by a provision as to *arrears* of rent, or of interest in respect of any sum of money charged upon any land or rent, or in respect 'of any legacy.' This leaves the case still in obscurity, but the better opinion so far would seem to be, that the words 'charged upon any land or rent,' must be implied, so as to confine the statute to legacies so charged. But there is another enactment (§ 43) by which the time for bringing a suit in the spiritual courts for any tithes, *legacy*, or other property is confined to the period allowed for actions, or suits at law or in equity: and this again throws the whole question into doubt."

No arrears of dower can be recovered for more than ix years. (§ 41.)

15. No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but *within six years* next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided, nevertheless, that, where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, *within one year next before* an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the

Arrears of
rent and in-
terest.

whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. (§ 42.)

The word "rent" is, in the above section, confined to that which arises upon a demise not under seal, but an action upon a demise under seal for rent in arrear may be brought within twenty years, by 3 & 4 Wm. IV., c. 42. (§ 3.)⁸⁵

Preservation
and extinction
of the
ownership.

16. But the means of preserving the ownership without resort to litigation, is thus provided for by § 14, which enacts :

" Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such lands, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

(85) *Paget and another v. Foley, executrix*, 2 Bing. N. C. 679 (1836). All leases required by the Statute of Frauds, or any other law, to be in writing, must be by deed (8 & 9 Vict., c. 106, § 3). But all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least, of the full improved value of the thing demised, may be by parol or verbal contract (29 Car. II. c. 3, § 2)

The bar is a final extinction of the right, and of all concurrent rights, and not merely an obstruction to the remedy, as the two following sections prove:—

“At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, *the right and title* of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, *shall be extinguished.*” (§ 34.)

“When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress or action, shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless, in the mean time, such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.” (§ 20.)⁸⁶

A person who has made an entry on land shall not be deemed to have been in possession within the intent of the statute (§ 10). A continual claim upon or near the land is not to preserve the right of entry, distress, or

(86) Thus titles depending upon non-claim are greatly strengthened, and many serious objections to their soundness removed.

The act extends to the spiritual courts, but neither to Scotland, nor, as to advowsons, to Ireland.

action (§ 11). The possession of one coparcener, joint-tenant, or tenant in common of the entirety, is not to be deemed the possession of the others, nor the possession by a younger brother or other relation to be the possession of the heir. (§§ 12 & 13.)

Positive prescription, with its common law rules.

17. The Common Law laid down the following rules concerning *positive* prescription:—

(1.) The only property claimable by positive prescription, are incorporeal hereditaments.

(2.) It must be founded on actual usage or enjoyment; for a mere claim will not establish the right.

(3.) The usage or enjoyment must have been continuous and peaceable; although an interruption of comparatively short duration will not destroy it.

(4.) The usage must have been from time immemorial, or from time whereof the memory of man runneth not to the contrary, which is held to be from the beginning of the reign of Richard I.⁸⁷

This rule has been, as we shall presently see, altered by 3 & 4 Wm. IV., c. 71.

(5.) The prescription must be certain and reasonable.

(6.) It must be laid either in a man and those whose estate he enjoys in certain property, called, as we have just seen, prescribing in a *que* estate, or in a man and his ancestors, or in a body corporate and their predecessors.

Here, a distinction should be marked:—

If a person prescribe in a *que* estate (that is, in himself and those whose estate he holds,) nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix of an estate, with which the thing claimed has no connexion;

(87) Richard's predecessor (Henry II.) died 6th July 1189, and Richard was crowned 3rd (or, as some say, 11th) September 1189. It is a disputed point whether Richard's reign commenced at his own coronation, or his predecessor's death.

but, if he prescribe in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross.

(7.) A prescription in a *que* estate must always be laid in him that is tenant in fee.

(8.) It cannot be for a thing which cannot be raised by grant.

(9.) That which arises by matter of record cannot be prescribed for, but must be claimed by grant entered on record; such as, for instance, the royal franchise of felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record.

(10.) A person cannot prescribe to do a wrong, or anything that would be a nuisance to others; *or* against an act of parliament, for that is the highest proof and matter of record in law; *or* against another's prescription.

(11.) Where a man prescribes for anything in himself and his ancestors, the prescription will descend only to the blood of that line of ancestors in whom he so prescribes; but if he prescribe for it in a *que* estate, it will be inheritable precisely in the same manner as that estate, since *accessorius sequitur naturam sui principalis*.

18. The 2 & 3 Wm. IV., c. 71, for *shortening* the time of prescription in certain cases, sets out with this recital:—

The 2 & 3 W.
4, c. 71.

“Whereas the expression ‘time immemorial,’ or ‘time whereof the memory of man runneth not to the contrary,’ is now, by the law of England, in many cases considered to include and denote the whole period of time

from the reign of King *Richard* the First, whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice.” And then provides—

As to rights of common and other profits à prendre.

19. “That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to *any right of common or other profit or benefit, to be taken and enjoyed* from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land, being parcel of the Duchy of *Lancaster*, or of the Duchy of *Cornwall*, or of any ecclesiastical or lay person, or body corporate, *except* such matters and things as are herein specially provided for, and *except* tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for *the full period of thirty years*, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of *thirty years*, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for *the full period of sixty years*, the right thereto shall be deemed absolute and indefeasible, *unless* it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.” (§ 1.)

As to ways, other easements, or watercourses, &c.

20. “That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to *any way, or other easement, or to any watercourse, or the use of any water* to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of *Lancaster* or

of the Duchy of *Cornwall*, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before-mentioned shall have been actually enjoyed by any person claiming right thereto, without interruption, for *the full period of twenty years*, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of *twenty years*; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated, and where such way or other matter as herein last before-mentioned shall have been so enjoyed as aforesaid, for *the full period of forty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.” (§ 2.)

21. “That when the access and use of *light* to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for *the full period of twenty years*, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.” (§ 3.)

22. “That each of the respective periods of years here-
inbefore mentioned shall be deemed and taken to be the period *next before* some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to, or acquiesced in *for one year* after the party interrupted shall have had or shall have notice thereof, and

As to the use
of light.

The periods,
how calcula-
ted.

of the person making or authorising the same to be made." (§ 4.)

As to pleadings and evidence,

23. "That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenement, in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter-of-fact, or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." (§ 5.)

Presumption exploded.

24. "That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim." (§ 6.)

25. "That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an *infant, idiot, non compos mentis, or feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto*, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible." (§ 7.) Disabilities.

"That when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoynd or derived, hath been or shall be held under or by virtue of any term of life or any term of years *exceeding three years* from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof." (§ 8.)⁸⁸

26. The 2 & 3 Wm. IV., c. 100, after reciting that—

"The expense and inconvenience of suits instituted for the recovery of tithes, may and ought to be prevented by shortening the time required for the valid establishment of claims of a *modus decimandi*, or exemption from or discharge of tithes," enacts—"That all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the king, his heirs or successors, or by any Duke of *Cornwall*,

The 2 & 3
W. IV.,
c. 100, as to
tithes.

(88) This act does not extend to Ireland or Scotland (§ 9.)

or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and in cases of claim to exemption or discharge, showing the enjoyment of the land, without payment or render of tithes, money, or other matter in lieu thereof, for *the full period of thirty years* next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or of other thing differing in amount, quality, or quantity, from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such *thirty years*, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing ; and if such proof in support of the claim shall be extended to *the full period of sixty years* next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus*, was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing ; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence shewing such payment or render of *modus* made or enjoyment had as is hereinbefore mentioned, applicable to the nature of the claim for and during the whole time that *two persons in succession* shall have held the office or benefice, in respect whereof such render of tithes in kind shall be claimed,

and *for not less than three years* after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be *less than sixty years*, then it shall be necessary to show such payment or render of *modus* made, or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up *the full period of sixty years*, and also for and during *the further period of three years* after the appointment and institution or induction of a third person to the same office or benefice, *unless* it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose, by deed or writing.” (§ 1.)

27. “Every composition for tithes, which hath been made or confirmed by the decree of any Court of Equity in *England*, in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be, and the same is hereby confirmed and made valid in law; and that no *modus*, exemption, or discharge shall be deemed to be within the provisions of this act, *unless* such *modus*, exemption, or discharge shall be proved to have existed and been acted upon at the time of or *within one year* next before the passing of this act.” (§ 2.)

What tithe compositions are valid.

28. “This act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term of life, or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the

To what cases the act does not extend.

owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind *within three years* next after the expiration, surrender, or other determination of such demise or composition.” (§ 4.)

The periods
excluded.

29. “Where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned.” (§ 5.) Also, “the time during which any person otherwise capable of resisting any claim to any of the matters beforementioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, *except* only in cases where the right or claim is hereby declared to be absolute and indefeasible.” (§ 6.)

As to allega-
tions in ac-
tions.

30. “In all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the *modus*, or exemption, or discharge claimed, was

actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case ; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.” (§ 7.)

31. “In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time, or number of years, than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.” (§ 8.)

Presumption
for any lesser
periods not
allowed.

32. By the 4 & 5 Wm. IV., c. 83, it is enacted, that “from and after the passing of this act [15th August, 1834], it shall and may be lawful for the defendant or defendants, in any action or suit which may have been commenced or instituted since the passing of the said recited act [2 & 3 Wm. IV. c. 71] for the recovery of tithes, or for invalidating claims of a *modus decimandi*, or an exemption from or discharge of tithes, for lands in respect whereof no tithes, nor any composition in lieu thereof, shall have been actually rendered or paid within the space of *sixty years* previous to the passing of this act, with the consent of the plaintiff or plaintiffs in such action or suit, to pay the amount of the costs and expenses (to be taxed as between party and party) which may have been incurred by or on the part of the plaintiff or plaintiffs in such action or suit, into the Bank of England, in the

The 4 & 5
W. IV., c. 83.

name and with the privity of the accountant-general of the Court of Chancery, or of the Court of Exchequer,⁸⁹ or of the proper officer of the court in which such action or suit shall have been brought, to the credit, or on account of such action or suit; and in every case where such costs and expenses shall be so paid into court, all further proceedings in such action or suit (except as hereinafter provided) shall be stayed and suspended until the end of the next session of parliament. (§ 1.) The plaintiff may, however, give notice to defendant of his intention to proceed in such action; in which case the defendant may have his costs out of court. (§ 2.) If the plaintiff accept the costs, all proceedings to be abandoned. (§ 3.) The successors, heirs, executors, administrators, or assigns of a plaintiff may act, in case of his death. (§ 4.) Provided that judges may, upon sufficient cause shewn, permit actions to be proceeded with, for certain reasons therein specified. (§ 5.) Previous claims, unaffected. (§ 6.)

(89) The Equity side of this court was abolished by 5 Vict. c. 5.

CHAPTER IV.

FORFEITURE.

1. Described. | 2. How it arises.

1. Forfeiture is the penalty for an offence or unlawful Described. act, or for some wilful omission of a tenant of property,⁹⁰ whereby he loses it, together with his title, which devolves upon others.

2. Forfeiture results from the following circumstances : How it arises.

(1.) Treason, misprision of treason, felony, murder, *præmunire*, and striking or threatening a judge.

By attainder, consequent upon actual sentence in treason, a man forfeits to the crown all his lands and tenements of inheritance of freehold tenure, whether fee-simple or fee-tail, and all his rights of entry on freehold lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown ; and also the profits of all freehold lands and tenements which he had in his own right for life or years, so long as such interest shall subsist.

By misprision or concealment of treason, the profits of lands are forfeited during life.

By attainder for *felony*, the offender forfeits the profits of all estates of freehold during life ; and by attainder for *murder*, the offender moreover forfeits, after his death, all his freehold lands and tenements in fee-simple (but not those in tail), to the crown for a year, day, and waste.

By *præmunire*, which is a barbarous word, corrupted

(90) The effect of forfeiture on personalty will form a subject of our future enquiry.

from *præmoneri*, to be fore-warned ; and therefore, according to the proverb, fore-armed. It is the name of a writ, so called from its first word, and also of the offence, on which the writ is granted preparatory to a prosecution for the offence. The language of this writ is “ *Præmunire facias* A. B. &c., *i. e.* Cause A. B. to be forewarned, that he appear before us to answer within two months for the contempt wherewith he stands charged.” The contempt is particularly set forth in the preamble of the writ. The offence is one immediately against the sovereign ; because it consists in introducing a foreign power into this land, and creating *imperium in imperio*.

The old offence of introducing the Papal power in this country was called *præmunire*.

The first statute against Papal provisions was the 35 Edw. I., st. 1. The act which is usually, though perhaps improperly, called the Statute of *Præmunire*, is the 16 Ric. II., c. 5, which enacted, That whoever procures at Rome or elsewhere any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king’s protection, their lands and goods forfeited to the king’s use, and they shall be attached by their bodies to answer to the king and his council, or process of *præmunire facias* shall be made out against them, as in other cases of provisors.

The last of our old statutes relating to this offence is the 2 Hen. IV., c. 3.

The courts before which the offender may be summoned are specified to be the Council or Parliament, the Chancery, the Justices of the two Benches, or the justices deputed for that purpose.

Should the offender not appear according to the exigency of the writ, he, his procurators, attorneys, execu-

tors, notaries, and maintainers shall be put out of the crown's protection, forfeit their lands, goods and chattels to the crown, and be imprisoned and ransomed at the royal will, and on the return of *non est investus* to the writ issued under the award of *capiatur*, they shall be put in exigent, and outlawed.

When the offender has appeared, then the ordinary judgment is, that he be put out of the crown's protection, his lands and tenements, goods and chattels, forfeited to the crown; and that his body remain in prison during the royal pleasure.⁹¹

A peer of the realm cannot claim his privilege of trial by his peers in an indictment for a *præmunire*.

A prosecution of this sort is now unheard of, for these statutes have all grown obsolete. There is only one instance of such a prosecution in the state trials, in which case the penalties of a *præmunire* were inflicted upon some quakers for refusing to take the oath of allegiance in the reign of Charles II., a case in which the court resorted to the most illegal and unjustifiable means for obtaining a conviction.

These penalties of *præmunire* were primarily applied to depress the power of the Pope; but they have been made to bear upon other offences, which will be found enumerated in any recent edition of Blackstone's Commentaries.

By striking any person in the Superior Courts at Westminster, or drawing a weapon upon a judge there presiding, the offender forfeits the profits of his lands during his life.

It is to be observed that copyholds, as well for treason as murder, are forfeited to the lord, and not to the crown.

The forfeiture begins from the day of the commission

(91) Co. Litt. 129 b; *Lord Vaux's Case*, 12 Rep. 92; Harg. St. Tr., Vol. II., p. 463.

of the treason, so as to nullify all intermediate sales, incumbrances, and transfers. A wife's dower is forfeited by 5 & 6 Edw. VI., c. 11.

A person sometimes executes a conveyance of his realty in order to avoid a forfeiture: it is almost needless to remark that such a conveyance is fraudulent, and absolutely void.

The royal pardon converts the offender into a new man, acquitting him of all penalties and forfeitures relating to such forgiven offence.

(2.) Conveyance contrary to law, as transferring a freehold to an alien, who may take lands but cannot hold them;⁹² wherefore upon office found the crown is entitled to the land.

(3.) Alienation in mortmain, or to any kind of corporation (which was supposed to hold property in a dead hand locked up from all change or transfer), was prohibited under pain of forfeiture to the lord. The crown may, however, grant a license, which will avoid this forfeiture.⁹³

Donations of realty for charitable purposes are thus restrained:—

By 9 Geo. II., c. 36, all conveyances of lands or tenements, or money to be laid out thereon for any charitable uses (although not to corporations), shall be void, unless made by deed indented, sealed, and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of the donor or grantor (including the days of the execution and death) and be enrolled in the High Court of Chancery, within six calendar months next after the execution thereof; and unless the same be made to take effect in possession for the charitable use intended immediately from the making

(92) See 7 & 8 Vict., c. 66, § 5, and p. 252, *ante*.

(93) 7 & 8 Wm. III., c. 37; 3 & 4 Vict., c. 60; and 6 & 7 Vict., c. 37, § 12.

thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever for the benefit of the donor or grantor, or of any person or persons claiming under him."

But it is provided, that what relates to the sealing and delivering of the deed *twelve calendar months before the death of the grantor*, shall not extend to any purchase "to be made really and *bonâ fide* for a full and valuable consideration, actually paid at or before the making of such conveyance, without fraud or collusion." This provision was only intended to prevent such purchases from being avoided by the death of the grantor within twelve months, and not, as it was generally apprehended, to exempt such purchases altogether from the operation of the act. The 9 Geo. 4, c. 35, was, therefore, passed to correct this mistake. The two universities and their colleges, and (in favour of their scholars only), the colleges of Eton, Winchester, and Westminster, are exempted from the operation of the statute, with one restriction only, which has since been abolished by 45 Geo. III., c. 101. The like favour has been extended to the British Museum by 5 Geo. IV., c. 39, § 3.

(4.) Disclaimer, which is a tenant's⁹⁴ denial of his landlord's title, either by refusing to pay rent, or denying any binding obligation to pay it, or by setting up a title either in himself or any other person. This operates a forfeiture of all interest in such tenant.

(5.) Breaches of covenants or conditions contained in a lease or other instrument, when it is expressly stipulated that they shall occasion forfeiture: however, a forfeiture, under these circumstances, may be waived by the person

(94) Before the 8 & 9 Vict., c. 106, if a tenant of a particular estate attempted to pass by feoffment a larger interest in the property than he possessed, it would have caused a forfeiture of his estate; but this act (§ 4) has converted a feoffment into an innocent conveyance, which only transfers that interest which a tenant may lawfully transfer, so that this kind of forfeiture is altogether exploded.

entitled to take advantage of it, either by his express declaration, or by any act inconsistent with it, or admitting a continuing tenancy, as by receiving rent accrued due since the breach, or distraining for the same, or by encouraging the tenant to make subsequent improvements; but, he must have fully known of the act of forfeiture at the time of waiver, otherwise it will be no waiver. Subsequent breaches are not waived by a prior act of dispensation.⁹⁵

(6.) Waste, which is a lasting damage to the freehold and inheritance. Waste is now seldom insisted on as a forfeiture, but is pursued by an action for damages occasioned by it.

(7.) Breach of copyhold customs.⁹⁶

(8.) Bankruptcy and Insolvency: which shifts the title of the insolvent to his assignees for the benefit of creditors.⁹⁷

(95) As to forfeitures in the case of landlord and tenant, they will be noticed when we come to treat of leases.

(96) See *ante*, p. 250.

(97) Besides the grounds of forfeiture mentioned in the text, there are two, which obtain in ecclesiastical property, viz.—(1) lapse, which forfeits the right of presentation to a vacant living, by neglect of the patron to present within six calendar months; and (2) simony, which is the corrupt presentation of any person to an ecclesiastical benefice, whereby that turn becomes forfeited to the Crown.

CHAPTER V.

ALIENAGE.

This is the most common title to realty. It arises, as the word imports, from the transfer of property by one to another, and introduces the whole subject of the Practice of Conveyancing, the full consideration of which we shall postpone to the fifth and following Tractates, so as to present the practical department of this branch of our laws in one connected view.

CHAPTER VI.

ESCHEATAGE.

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| 1. Described. | 7. Bar of escheat. |
| 2. Distinguished from forfeiture. | 8. The 13 & 14 Vict., c. 60, as to trust and mortgaged property. |
| 3. When it arises. | 9. The crown usually forgoes its prerogative. |
| 4. What things escheat. | |
| 5. What things do not escheat. | |
| 6. Power of the lord by escheat. | |

Described.

1. An escheat⁹⁸ is a species of réversion : it is a sort of caducary⁹⁹ inheritance, and a fruit of seignory, the lord of the fee, from whom or from whose ancestor the estate was originally derived, taking it as *ultimus hæres* upon the failure, natural or legal, of the intestate tenant's family.

An escheat is partly in the nature of a purchase as well as of a descent ; it is a purchase so far as it is necessary for the lord to enter on the reverted property, in order to complete his full ownership of it ; and it is a descent, because the escheated estate follows the seignory, and is inherited along with it, by the lord's heir-at-law. The lord, on the escheat, takes the estate by a title paramount

(98) This is a word of art, according to Coke, derived from the French word, *eschier*, *quod est accidere* ; for an escheat is a casual profit *quod accidit domino ex eventu et ex insperato*, which happens to the lord by chance, and unlooked for. This law, which was introduced into this country by the Normans, is founded on the principle that the blood of the person last seised in fee simple, is by some means or other utterly extinct and gone ; and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance itself must fail ; the land must become what the feudal writers call *feodum apertum*, and result back to the lord of the fee, from whom or from whose ancestor it was originally derived. *Cruise's Dig.*, tit. xxx., § 6, vol. iii., p. 397.

(99) *Caducum* is an escheat, a windfall.

to the tenant, since he is in of an estate, out of which the tenant's interest was originally derived or carved. It is then a mixed title, being neither a pure purchase nor a pure descent, but in some measure compounded of both.

2. It differs from a forfeiture, in that the latter is a Distin-
guished from
forfeiture. penalty for a crime personal to the offender, of which the Crown is entitled to take advantage by virtue of its prerogative; while an escheat results from tenure only, and arises from an obstruction in the course of descent; it originated in feudalism, and respects the intestate's succession. So, while forfeiture affects the rents and profits only, escheat operates on the inheritance.

3. Escheat arises, then, where there is not any heir-at-law, which may be either by defect of lineage, whereby the descent is at an end, (*ob defectum sanguinis*, or *tenentis* in the case of an alien); or by the commission of treason or felony (*pro delicto tenentis*). When it
arises.

It arises from default of heirs, when the tenant dies without any lawful and natural-born relations on the part of any of his ancestors, or when he dies without any lawful and natural-born relations on the part of those ancestors from whom the estate descended, or where the intestate tenant, having been a bastard or denizen, does not leave any lineal descendants, since he cannot have any collateral descendants.

It arises from corruption of blood, when the tenant has been attainted¹⁰⁰ of treason or murder.

4. The following things escheat, viz. : a fee-simple; an What things
escheat.

(100) An attainder is the stain and corruption of blood, which the law attaches to a criminal who is capitally condemned. By the 54 Geo. 3, c. 145, it is enacted, that no attainder for felony, except for treason and murder, or for abetting the same, shall disinherit any heir, nor prejudice the right or title of any person other than that of the offender, during his own life.

estate-tail, where the tenant in tail has in himself the reversion in fee, otherwise the estate would pass to the reversioner; and a copyhold.

What things
do not
escheat.

5. The following things do not escheat, viz.: gavelkind, *propter delictum tenentis*; a rent-charge; a right of common, free warren, or indeed any kind of inheritance which does not lie in tenure, because they rather become extinct; a trust estate, for where the beneficiary dies without heirs, the trustee shall retain the land for his own benefit;¹⁰¹ an estate given to a corporation and their successors, for it reverts to the donor on the corporation being dissolved, unless perhaps it had been granted over to another before the dissolution; an equity of redemption; and money to be laid out in land.¹⁰²

(101) *Burgess v. Wheate*, 1 Bl. R. 123.

(102) In *Walker v. Denne*, 2 Ves. 170, testator directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real estate: the money not having been laid out, the Crown, on failure of heirs, has no equity against the next of kin, to have it laid out in real estate, in order to claim by escheat; the devisees, on becoming absolutely entitled, have the option given by the will; and in a deed of appointment by one, a *feme covert*, it was held sufficient indication of her intention, that it should continue personal against her heir claiming it, as ineffectually disposed of, for want of her examination. The important case of *Burgess v. Wheate*, 1 Eden, 177, 261, and 1 Bl. R. 123, was to the following purport:—A. being seised in fee *ex parte paternâ*, conveyed to trustees in trust for herself, her heirs and assigns, to the intent that she might dispose thereof as she should by her will or other writing appoint. A. died without making any appointment, and without heirs *ex parte paternâ*. It was held by Lord Keeper Henley (afterwards Northington), as well as by Sir Thomas Clarke, M. R., and by Lord Mansfield, C. J. (whose assistance the Lord Keeper had requested), that the heir *ex parte maternâ* was clearly not entitled. But Lord Mansfield thought the Crown was entitled by escheat; or if that were not so under the circumstances, then that as between the maternal heir and the trustees, the former was entitled. This opinion however was contrary to that of the Lord Keeper, and of the Master of the Rolls. It was decided, that there being a terre-tenant (*Barclay v. Russel*, 3 Ves. 430), the Crown claiming by escheat, had not a title by *subpœna* to compel a conveyance from the trustee, the trust being absolutely determined. Upon the right of the trustee, it was not necessary, for the determination of

6. The lord by escheat may distrain for rent as incident to the reversion ; but he cannot take advantage of a condition for re-entry, because he is not heir to the lessor ; he is also entitled to outstanding terms, and to all the charters, &c., yet he is liable to the incumbrances of the last tenant, because they are annexed to the possession of the land, without regard to any privity ; he is, however, not bound to execute a trust.

Power of the
lord by es-
cheat.

7. Since the lord's right to an escheat arises solely from the want of a tenant, it follows that an alienation either by deed or will, by the tenant, will bar the escheat. If an infant make a feoffment in person, and then die heirless, the estate will not escheat ; but if the livery of seisin be made by attorney, that will not prevent the estate from escheating *propter defectum sanguinis*, neither will a mere contract for sale bar the lord.

Bar of es-
cheat.

8. The statute law has made an exception to the general law of escheat in the case of a trustee or mortgagee dying intestate and heirless, for the protection of the beneficiaries or mortgagor.

The 13 & 14
Vict., c. 60,
as to trust
and mort-
gaged prop-
erty.

the question before the Court, to pronounce any positive judgment. It should seem, however, that he would receive no assistance from equity in support of his claims (*Williams v. Lord Lovelate*, 3 Ves. 757), and clearly a trustee not having the estate in lands purchased with trust-mones, cannot hold against the Crown claiming by escheat (*Walker v. Denne*, 2 Ves. jun. 170). In the case last cited, the court is reported to have said, that "copyhold cannot escheat to the Crown ;" but this *dictum*, in all probability, however applicable to the instance then under consideration, was not intended to be understood as a general proposition. Copyholds holden of a manor whereof a subject is lord, will escheat to him certainly, and not to the Crown ; but the 12th section of the statute 39 & 40 Geo. III., c. 88, after reciting, that "divers lands, tenements, and hereditaments, as well freehold as copyhold, have escheated and may escheat" to the Crown, enacts that "it shall be lawful to direct by warrant, under the sign manual, the execution of any trusts to which the lands so escheated were liable at the time of the escheat, or to which they would have been liable in the hands of a subject, and to make such grants of the lands so escheated as to the sovereign shall seem meet."

By 13 and 14 Vict. c. 60,¹⁰³ § 14, it is enacted:— That where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

That when any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate. (§ 15.)

That when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands. (§ 16.)

That when any person to whom any lands have

(103) The 4 & 5 Vict., c. 23, is repealed by this act. (§ 1.)

been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; that is to say: (1) When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found: (2) When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person: (3) When it shall be uncertain which of several devisees of such mortgagee was the survivor: (4) When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead: (5) When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee: And the order of the said Court of Chancery made in any of one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate. (§ 19.)

The act also protects from escheat property held upon trust or mortgage, by enacting—

That no lands, stock, or chose in action vested in any

person upon any trust, or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place. (§ 46.)

That nothing contained in this act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed. (§ 47.)

We have already seen¹⁰⁴ that a descent can now be traced through an attainted ancestor.

The crown usually foregoes its prerogative, and a fruit of seignory.

9. The law of escheat is seldom called into action in modern times, and when its application is required, the Crown usually waives its prerogative by making a grant, in order to restore the estate to the family of the attainted person, or to effectuate any disposition of it, which the former tenant may have contemplated.

(104) *Ante*, p. 525.

CHAPTER VII.

THE ABSTRACT OF TITLE, AND ITS REQUISITES.

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|---|---|
| 1. An abstract described. | 5. Method of writing an abstract. |
| 2. Its object and form. | 6. The abstracting of deeds. |
| 3. With what instrument it should commence. | 7. Wills, codicils, &c. |
| 4. Order of arrangement, and contents in certain cases. | 8. Private Acts of Parliament, &c. |
| | 9. Fines, recoveries, suits and bankruptcies. |

SINCE the Title to realty is made up of documental evidence,¹⁰⁵ its owner, when he intends to sell or mortgage, must¹⁰⁶ show his title to it, which he does, by producing

(105) There is a marked distinction between a real Estate and a personal Chattel. The latter is held by possession: a real estate by title. Possession of an estate is not even *primâ facie* title. It may be by lease, or only from year to year. The cases have gone upon that distinction. Is there any instance of a purchase upon mere possession? If the vendor, being asked, acknowledge to the purchaser, that the deeds are in the possession of another, who is to be postponed? * * * *

I repeat, that land is held not by possession, but by title; not so as to personal chattels; for the common traffic of the world could not go on. Therefore a sale in market *overt* changes the property of a chattel; and the rule, that possession is the criterion of title to a chattel, has been adopted in the Bankrupt Acts: so that, if the owner have permitted the bankrupt to be the visible proprietor, the property is divested; for no one can distinguish the property except by the possession. But that is not so as to land; for no person in his senses would take an offer of a purchase from a man, merely because he stood upon the ground. It is not even *primâ facie* evidence. He may be tenant by sufferance, or a trespasser. A purchaser must look to his title; and, if, being asked for the deeds, he acknowledges, he has not got them, the purchaser is bound to further inquiry.—Per. *Lord Erskine, in Hiern v. Mill*, 13 Ves. 119, 121, and 122.

(106) The right to a good title is a right not growing out of the agreement between the parties, but is given by the law. But a vendor may of course stipulate that the purchaser shall accept the title, such as it is; but a condition to take a title without its usual guards, e. g., a leasehold title without the lessor's title, or to cast upon the purchaser a responsibility which belongs to

an abstract.¹⁰⁷ For, whoever proposes to sell or charge an estate, *without qualification*, asserts, in fact, that it is his to deal with, and consequently that he has a proper title.¹⁰⁸

the seller, for example, to obtain the lessor's consent to an assignment, will not be inferred from ambiguous expressions, or from notice of the liability.

A proviso, that in case the vendor could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase-money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought thereon, was held not to authorise the seller to say he cannot answer the objections to the title, and therefore the contract was void. The meaning is, that if the seller cannot make a title by the time mentioned, the contract shall be void as against him, and the purchaser has a right to be off his bargain. So *à contrá*, if the purchaser does not pay the money, the seller may avoid the contract, but the purchaser cannot say, "I am not ready with my money, therefore I will avoid the contract," nor can the seller say, "my title is not good, therefore I shall be off." It would be a monstrous construction if either party could vitiate the agreement by refusing to perform his part of it.—*Roberts v. Wyatt*, Taunt. p. 268.

A stipulation in a contract, that if the seller do not make a title by a given day, or the like, the contract shall be void, means in construction of law, void at the option of the purchaser, who may enforce it notwithstanding the proviso.

Sometimes a purchaser has waived his right to object to the seller's title. Upon an express waiver little difficulty is likely to arise, but in most cases the waiver is not express, but implied from the conduct of the purchaser.

A purchaser by entering into possession is generally held by that act to have waived the objections to title, for where a purchaser, knowing of an objection to a title, enters into possession of the estate, he may be considered to have himself executed the purchase.

But if possession is authorised by the contract to be taken before a title is made, the fact of possession cannot by itself be used against the purchaser, for that would be contrary to the very terms of the contract.

And where a purchaser is entitled to call for a good title, his taking possession with the concurrence of the vendor will not amount to a waiver of any right; and the subsequent delivery of abstracts or negotiations on the subject of title render this clear.

And if a purchaser do take possession, with notice of a defect which it is understood is to be remedied, he cannot be compelled to complete his purchase, but may recover his deposit if the title be not made good, unless it could be made out that he was to take the title as it stood; when the event is ascertained that a good title cannot be made, he is entitled to have his deposit back.

An actual resale, as far as mere title is concerned, can seldom be deemed an acceptance of it, because unless the first purchaser has bound the second to

1. An abstract of title is an epitome of the evidences of ownership showing, (as succinctly and as completely as possible,) ¹⁰⁹ the soundness of one's right to a given estate, together with any charges or circumstances in anywise

An abstract described.

take the title as it stands, the former must intend to obtain a good title himself in order to confer it on the latter.

But a purchaser cannot be held to have waived objections to a title because his counsel has approved of the title.

The acceptance of an abstract as satisfactory only waives the objections in the abstract; and if in such a case the purchaser can prove the title bad, of course the contract could not be enforced.

And of course a man may have accepted the title as it appears upon the abstract, and yet not have waived his right to have it proved as stated.

Statements in the abstract that the seller has not in his possession or power certain of the deeds, or has them not in his possession, will bind the purchaser, if he proceed with the treaty without objecting on this head, not to object that those deeds are not delivered up to him on the completion of the purchase; but they do not inform him that the vendor is unable to give any proof of the existence of documents set out in the abstract.

A purchaser may, by simple acquiescence, be held to have waived objections to the title, although he has not taken possession.

If a purchaser take possession under a contract, and he afterwards rejects the title, he must relinquish the possession, and equity cannot prevent the vendor from turning him out by an ejectment, although he may have expended money in improvements.—Sugden's Vend. and Pur. c. viii. § 1.

(107) A purchaser may require to be furnished with an abstract prepared in the usual way, (*Horne v. Wingfield*, 3 Sc. N. R., p. 340,) even although he have agreed to accept the title (*Morris v. Kearsley*, 2 Y and C. 139 :) he may retain it, during negotiations upon, and even after rejection of, the title, until the dispute be finally settled, for the purpose of showing the grounds of such rejection; and in the interim, he may maintain trover for it even against the vendor (*Roberts v. Wyatt*, 2 Taunt. p. 268 :) when the contract is finally abandoned by both parties, *he must return the abstract*, and may not retain any copy of it; counsels' opinions, and observations he may, it appears, retain if written upon separate paper; (*Wood v. Court*, 2 Atk. Conv. p. 463) or if written upon the abstract itself, he may erase them before returning it. Dart on Vend. and Pur. c. viii. p. 130.

(108) Martin's Conv. c. ii. p. 83.

(109) If the sale is made subject to the very ordinary stipulation, that the vendor shall deliver an abstract within a certain time, and the purchaser shall make his objections within a certain time, and the vendor delivers an imperfect abstract, the question may arise whether the second branch of the stipulation is not conditional on the performance of the first, so that the vendor's neglect to deliver a perfect abstract absolves the purchaser from all obligation of making objections within the time specified. 1 Sweet's Jarm. Bythe, p. 75.

affecting it. A perfect abstract shows that the owner has the legal and equitable estates at his own disposal, perfectly unincumbered.

Its object and form.

2. In practice, the professional adviser of the owner prepares the abstract at his client's expense (except on sales to a railway company, when it must be borne by the company, unless it be stipulated otherwise)¹¹⁰ and delivers it to the professional adviser of the proposed purchaser, or mortgagee, who compares it with the original title-deeds, and makes requisitions (when necessary) in order to ascertain any important but undisclosed facts, to remedy any defects, or to dissipate any doubts or ambiguities : he then frequently lays the whole before counsel, for his opinion as to the safety of the title, and the propriety of his own client's embarking his capital in the transaction.

Should the abstract be long and voluminous, a list of the dates and nature of the deeds, &c. chronologically arranged, with references to the pages of the abstract, in which they are to be found, would facilitate perusal.

Every abstract should have an introductory heading, by way of intimating the subject-matter of the title, briefly setting forth the owner's name, the nature, situation and quality of the property, with the particular interest therein, *ex. gra.*

An Abstract of the title of A. B. to the fee-simple and inheritance of ———, in the parish of ———, in the county of ———, containing by estimation — a. — r. — p.

Of course this heading varies, according to the circumstances, as whether the estate be leasehold, copyhold, or customary freehold, or is held for lives, or for a term of years, or in gavelkind or borough-english or is tithe-free, &c.

(110) The Lands Clauses Consolidation Act, 1845, the 7 and 8 Vict. c. 18, § 22.

When one abstract is prepared for the use of several purchasers, who have purchased different parcels or lots of the same property, the particulars of sale and a copy of the contract, with an intimation of the lands purchased, should accompany the abstract ; or, a note at the head of the abstract, or some indorsement on the same, should state the particular parcels bought by the purchaser in question ; those parts of the abstract which are relevant should receive some mark of distinction ; or rather those parts which are immaterial should be noticed as such, or cancelled. It would, in many cases, be worth the trouble and expense that the purchaser's solicitor should frame a new abstract out of the heterogeneous mass, accompanied by a statement of any proper and feasible objections.¹¹¹

3. When practicable, an abstract of a freehold estate should commence with the conveyance to the person who was the first purchaser, since it affords a strong presumption that the title was considered good at that time, and that the person by whom the conveyance was made was the absolute owner.

With what instrument it should commence.

If an abstract begin with a conveyance in fee, executed

(111) 1 Prest. Abs. iii, 37.

The object of every abstract is to enable the purchaser or his counsel to judge of the evidence deducing, and of the encumbrances affecting, the title.

Every title involves in itself the question of legal and beneficial ownership.

On the one hand, it is in vain that there is a good title at law, if that title be bad or defective in equity.

On the other hand, it is not sufficient that there is a good title to the legal estate, or to the equitable estate, if it be encumbered with judgments, legacies, debts to the crown, or other charges ; for in proportion to the extent of such encumbrance will there be a reduction in the actual value of the interest of the vendor.

In short, every abstract should describe whatever will tend to enable a purchaser or his counsel to form an opinion of the precise state of the title at law and in equity, together with all chances of eviction or even of adverse claims.

And these points should be kept in mind, in preparing the abstract of title, and also in comparing the same with the documents, or evidences of the title.

more than sixty years ago, such a deed is universally admitted to be a good root of title, though there may not be any thing in the deed disclosing how the grantor became entitled to the inheritance; indeed, it is preferred that the instrument should have no recital.¹¹²

Every document subsequently to the one commencing the abstract must be noticed,¹¹³ excepting, perhaps, expired

(112) Sweet's Jarm. Bythe, p. 72.

(113) Documents effecting merely *equitable* interests give rise to considerations of greater difficulty; Sir E. Sugden states generally that the solicitor "should abstract every document upon which the title depends, or upon which any difficulty has arisen: wherever he begins the root of the title he ought to abstract every subsequent deed:" this however, it is conceived, must be understood to mean every document upon which the *purchaser's* title will necessarily depend; if, for instance, the vendor be possessed of a document declaring that a prior owner who purchased apparently on his own account, was in fact a trustee, or, that a mortgage debt was trust-money, the title of the *vendor* who has notice of the trust may depend upon various instruments which would be altogether immaterial to a purchaser destitute of such notice; and it would, it is conceived, be unusual and highly improper for the solicitor to allow notice of such a trust to appear upon his abstract: this, however, it must be admitted, is, *pro tanto*, a departure from the general principle, that it is for the purchaser's solicitor, and not the vendor's, to judge of the materiality of the muniments of title: but it is sanctioned by convenience and universal practice. Other cases may perhaps occur in which a document may be without material risk suppressed, as for instance, where a good title is shewn to the legal estate, and a charge which clearly operated merely in equity, has been paid off, and no trace of it appears upon the subsequent title, the difference between the suppression of such an instrument and a legal mortgage is evident; the equitable charge has no operation as against a subsequent purchaser for valuable consideration without notice, and his title therefore is not dependent on the sufficiency of the release; nor does there seem to be any good reason for making a distinction between an equitable charge by deed and a mere memorandum accompanying an old equitable mortgage by deposit, which, except upon special grounds, is never abstracted but in the case of a legal mortgage, the purchaser's title at law will depend (theoretically if not practically), upon the legal validity of the deed of reconveyance, whether its existence be known to him or not: still, even in the case of the equitable charge, it seems at least probable that a solicitor who would suppress it, under the idea that it is unimportant to the title, does so at his own risk; and it is submitted, that such a course should rarely, or never be taken in respect of an instrument which is so framed that it could by possibility affect the legal estate; as, for instance, a mortgage of an equity of redemption drawn as a conveyance, with a proviso for redemption, and which, though merely a charge in equity, if the first mortgage be valid in law, would yet pass

leases; and it should be stated in whose possession the title deeds are. Of course every document forming part of the title should be abstracted in chief, and not introduced by way of recital in other abstracted instruments.

A mortgage-deed, however, is a very satisfactory commencement of an abstract, and perhaps is preferable to a purchase-deed; for, while in the latter transaction, the vendor may have defended himself against producing a complete and perfect title, by special stipulations and allowances for apparent defects, a mortgagee will not risk his loan without a careful and zealous sifting of the title, and would rarely, if ever, submit to any conditions at all implying danger or deficiency.

If, however, the first document cannot be shewn to be a purchase or mortgage-deed, the next best instrument is a will or some settlement made by the absolute owner of the fee; because such a deed, accompanied with possession consistent with the title, furnishes a like presumption of a good title.

The general rule is to take up the commencement of the title from a period of sixty years,¹¹⁴ or from the last purchase-deed, or the last settlement prior to that period, which does not depend upon any previous document for its validity. Of course, it is not actually necessary to commence a title with a document, for where it never existed, as when the title depends upon successive descents, which is a very safe title in intendment of law, then the production of evidence, proving long continued enjoyment and exercised rights of ownership, affording strong presumption of absolute title, will be sufficient.¹¹⁵

the legal estate, supposing it not to have been effectually transferred by the prior instrument.—Dart's Comp. p. 143.

(114) But see *ante*, p. 501, pl. 7.

(115) "A title in this country does not mean merely those documents which *directly* confer right upon the existing possessor; as, for instance, the deeds of lease and release by which an estate is conveyed to you, but it means the abstract result of the whole series, or succession of instruments and events by

Where a vendor has title-deeds, which deduce the evidences of ownership from a very remote time, then a nice question arises, with what document to commence the abstract. The satisfactory solution of this difficulty would be to exhibit a title, candidly and honestly, during the ordinary period, as would not involve the vendor in a labyrinth of irremovable difficulties, that may be craftily weaved about him by vexatious objections and captious enquiry, which, although more ingenious than solid, and more cautious than wise, may, after an incurment of considerable expense, put an end to an otherwise valid and safe purchase. Skill is certainly demanded to hit the happy medium between unnecessary length and satisfactory extent.

Prudence points out the propriety of a thorough investigation of a title, which is at all intricate or voluminous, previously to any dealing with the property. For, while such a course guards against any reasonable chance of exposing defects to successful claims founded thereon, or to vexatious and costly litigation, it likewise suggests proper means towards the removal of any technical difficulty, and discovers the need of stipulations in the articles of sale and the contract, which will preclude a purchaser from questioning the title, and compel him to take it as it is.¹¹⁶

An abstract shewing a clear and good root of title for

which the possessor for the time being could, according to the existing law of this country, be in any way affected, either as raising questions of dormant right in others, which still might be rendered available; or as creating incumbrances with which he is or may be charged."—Park, on Registration, p. 36.

(116) "Such stipulations seldom injure the sale, or materially affect the price; and they prevent the infinite trouble and the heavy expense frequently incurred for want of this precaution. Such objections are too frequently taken, or if not originally taken, are insisted on for the purposes of delay, or to impose on the seller terms to which he would not otherwise submit: and they involve the seller sometimes in considerable difficulties, and not unfrequently in actual ruin and bankruptcy, by depriving him of those means by which he expected to discharge engagements, into which he had entered on the faith of this resource, which thus fails him."—1 Prest. Abr. 34.

sixty years is sufficient, although the owner has title-deeds relating to a much earlier period : while these, however, need not be abstracted, yet the purchaser or mortgagee has a right to inspect them all, in order to see that they do not disclose any defects, or lead to any dangerous consequences, and a vendor would not be justified in withholding them.¹¹⁷

4. A simple abstract, which relates to one estate only, should set forth in chronological order a clear statement of the material parts of the deeds, wills, writings, records, and private acts of parliament, which at all affect or concern the title to be deduced, together with such matters *in pais*, as births, majorities, marriages, deaths, survivorships, pedigrees, descents, successions, &c. as connect the several circumstances or in anywise vary the title ; and these facts should be authenticated by such legal evidence as would be deemed satisfactory and conclusive in an action to try the title. Judgments, crown debts, charges and incumbrances should be fairly and unreservedly stated.

Order of arrangement, and contents in certain cases.

But a complex or compound abstract is not susceptible of a chronological arrangement ; as when the title relates to different parcels of land or different interests, or the property belongs to joint-tenants, tenants in common, or coparceners, who have entered into a partition, and there is a different title to their shares : it would then be better to arrange the documents relating to one portion under a distinct heading, so as to keep the title to each part in a connected series ; and sometimes separate abstracts for the

(117) Wherever a document which refers to earlier interests, in the vendor's possession, would form a satisfactory commencement of the abstract, if there were no earlier documents, the most prudent course will be to abstract the earlier documents rapidly and concisely, by way of introduction, so that the abstract shall commence, in point of form and detail, with the more modern assurance. Such a procedure, if judiciously executed, will often satisfy the purchaser's counsel, and prevent the trouble and expense which might be caused by his raising the question as to the purchaser's right to have all the deeds fully abstracted.—1 Sweet's Jarm. Bytch. p. 64.

different titles would simplify the business, and avoid an embarrassing confusion, especially if the several properties be distinct, or the title is compounded of both freehold and copyhold. Should the distinct titles to the several parts of the property afterwards become united, then there should be a deduction of the title to each part separately up to the point of junction.

A title under an exchange should show the titles of both the estates exchanged.¹¹⁸

So to an enfranchised copyhold, the freehold title of the lord, and the customary title of the tenant prior to the enfranchisement should be deducted.

With regard to copyholds, there should be abstracted the date of every surrender and admittance, with the names and descriptions of the parties thereto, the particular property, and also the wills, intestacies, descents, forfeitures, &c. (if any).

In the deduction of title to an advowson, the presentations should be mentioned in their order, and should be shewn at the head of the abstract, thus:—"A statement of the presentations, with the names of the patrons and clerks, presented during the period of this abstract: A. B. clerk presented by C. D. January 12, 1760," and so forth.

A tenant in common or coparcener purchasing of another is entitled to an abstract of their general title.

(118) Where the estate has been taken in exchange at common law, or under mutual conveyances with eviction clauses, the abstract must, down to the exchange, show the titles to both estates; unless in the case of a common law exchange (as to the future operation of which see 8 and 9 Vict. c. 106, § 4.) the estate given in exchange has since been aliened, and the vendor can prove the alienation.

Where the estate has been taken in exchange under the common Inclosure Act, 8 and 9 Vict. c. 118, the single title alone seems necessary, as the act contains a provision making the award when confirmed, conclusive evidence that the directions of the act have been complied with, and declaring that every allotment, exchange, &c. specified and set forth in the award shall be binding and conclusive on all persons whomsoever.—Dart's Comp. pp. 135 and 136. See 4 and 5 Wm. IV. c. 30, §§ 24 and 25.

Upon a sale of mining shares, the title under which the mines are worked is all that is necessary.

As to tithes and other property derived from the crown, the abstract must set forth the original grant.

It is clear that upon a sale of leasehold property, the vendor must, (except it be a bishop's lease),¹¹⁹ deduct the lessor's title,¹²⁰ as well as his own title to the term, unless he has, by a stipulation, protected himself from so doing.¹²¹

As to life and reversionary interests in trust monies, the deed or will creating the trusts should be abstracted.

(119) Episcopal leases, however, (and the same remark is equally applicable to the leases of other ecclesiastical bodies,) are not governed by the same rules as those granted by private persons; for the right of a bishop to demise, depends not on title, technically speaking, but on the statute law of the land. The principal points to be attended to are, 1st. that the estate demised is annexed to the see; and 2ndly, that the leases, (for there is commonly a succession of them granted to the same person or his representatives), are conformable to the provisions of the statute-law. In proof that the land belongs to the bishopric, no other evidence need be given than that which is afforded by the leases themselves, authenticated by the episcopal seal; for it is not to be supposed that a public functionary has either fraudulently put his seal to a public instrument, or acted under a mistake; and thus granted what does not belong to the see. Where there has been a succession of leases, such of them as have been made within the last fifty or sixty years, ought at least to be produced and abstracted.

It is the practice, too, in regard to leases by *lay* corporations, who have *notoriously* been the owners of the property demised for a very considerable period, not to require any evidence of title beyond that of the lessee.—1 Martin's Conv. p. 152.

(120) The reason for requiring the production of the lessor's title to demise, (apart from all questions of contract), is sufficiently obvious. He might be tenant for life only, and yet have attempted to grant a lease for five hundred years; or he might have assumed a power, which he did not possess, for appointing for such or any other term; or even, assuming that he had an estate commensurate with the interest alleged to be created, yet such estate might be in mortgage; and the lease of a mortgagor, even if in possession, binds not the mortgagee.—1 Martin's Conv. p. 151.

(121) The question of right can arise only in the very careless absence of stipulation. Lessors are become very cautious how they produce the evidence of their title; and unless they have covenanted to produce the deeds, there does not appear to be any means to compel them, otherwise than as between litigating parties in a court of law by means of a *subpœna duces tecum*, &c.—1 Prest. Abs. 14.

In deducing a title to a policy of life insurance, it should be shewn that the age and health of the person, whose life is assured, correspond with the representation made to the insurance office ; and if the assurance is effected on the life of another, that the party effecting it had such a pecuniary interest in such life at the time, and so uninterruptedly to the time of sale, as to sustain the insurance, and that the last premium has been paid.¹²²

Method of
writing an ab-
stract.

5. The usual method of writing an abstract is to make five margins and to commence therein the several parts¹²³ of a deed, or document, as in the following plan :—

1st Margin.	2nd Margin.	3rd Margin.	4th Margin.	5th Margin.
The Dates	Character of the Instruments, with the names and description of the parties ; Indorsements of deeds ; Manorial customs ; Certificates ; Statements ; Heading to different title or property (when necessary).	Recitals ; <i>Testatum</i> ; <i>Habendum</i> ; <i>Reddendum</i> ; Powers ; Provisoos ; Covenants ; Considerations ; Declarations. Agreements.	Operative words or operative clause ; Uses limiting the estate ; Trusts ; Provisoos affecting them.	Parcels, with exceptions (if any) ; General words with any reservations ; the sweeping clauses of the reversion, estate, deeds, &c. ; execution ; attestation ; receipts ; Registry ; Inrolment.

The abstract-
ing of deeds.

6. As to the abstracting of deeds, their several parts should be set forth according to the above scheme.

Compound deeds, which transfer freehold and leasehold property, or real and personal estate, or a fee-simple and a term for years, consist of various *testatum* clauses. In such

(122) Sweet's Jarm. Bythe. pp. 84 and 85.

(123) In the 5th Tractate will be attempted a succinct exposition of the several parts of a deed, with their value relatively as well as positively.

a case, the abstract should set forth those parts only, which are relevant to the title sought to be established.

We will make some practical remarks as to the method of abstracting deeds:—

The dates of the deeds, &c. should be stated in figures in the outer margin thus:—"12 Jan. 1799." Sometimes no other date appears than the year of the sovereign's reign, then it should be stated:—"10 February, 56 Geo. III. (A. D. 1816)."

The nature of the document should follow: *e. g.* "By Indenture of feoffment." "Deed-Poll of a Bargain and Sale."

To the names and descriptions of the parties, it is frequently advisable to state (when the fact is not disclosed by a recital) the particular and descriptive characters, in which they acted or stood in relation to the property, as heir at law, surviving trustee or executor, or child, and to notice when a party is deceased. These statements should be bracketted as averments, to distinguish them from facts appearing in the deed or document; the different parties ranged in different lines, thus:—

Between A B, of &c. of the 1st part,

C D, of &c. of the 2nd part,—and so on,

facilitates perusal, and renders easy the connection of the several facts; all which promotes a correct judgment. When a number of persons are of one part, a reference to them as "several other persons, being ——— of the — part," will suffice.

Immaterial matter in recitals should never be stated in the abstract, but merely noticed thus:—"after reciting, amongst other things not material to the present title,"—But everything affecting the history of the legal or equitable title, to which the title-deeds are lost or wanting, should be fully abstracted.

When a recital refers to a deed, &c. already abstracted,

the simple fact should be mentioned, together with the page of the abstract where it is abstracted, thus :—" Reciting the before abstracted ——— dated ——— (*ante* p. 590.")

Should the early title depend on recitals, it will be better to take them out of the deed containing them, and arrange them chronologically, thus :—" (date) It appears by a recital in ——— of the ——— day of ——— (afterwards abstracted) that, &c."

The *testatum* clause is concisely shown, with the consideration and the parties between whom it moves, omitting the words of grant, &c. in the past tense.¹²⁴ The clause which acknowledges the receipt of the consideration money, not being the best evidence of its payment, needs not to be noticed, except there be no receipt endorsed on the deed, or the money is expressed to have been paid at a previous time, or for a particular purpose, as in discharge of a mortgage, bond, portion, or legacy, or in a particular manner, as by deducting it from an account current.

With regard to the parcels, the better plan appears to be to give them *in extenso* in the abstract of the first deed precisely as they are there set forth, and in the abstract of every subsequent deed, to notice any variation, which may have taken place in their description, so as to enable the purchaser to judge whether the variations affect the title's validity.¹²⁵

When the parcels are short, it is sometimes the practice to give them at length in the heading of the abstract,

(124) It would conduce greatly to accuracy, and would facilitate the perusal of abstracts, if the contents of documents were abridged merely, without any attempt being made to convert the present into the past tense; an operation which often gives rise to ambiguity, where it is not performed with considerable care and skill. 1 Sweet's Jarm. Bythe. p. 91.

(125) To the general rule that, in the abstract of the subsequent deeds after the first, the parcels may be referred to generally, or by a slight notice of them, the following exceptions should be made, and others of the like nature will fall under the same consideration.

1st, If the lands in question are a farm, parcel of a manor, or a close, parcel of a farm, and the manor or farm is the subject of description in the former deeds, then the description of the farm or close should be given at length,

and then merely refer to them in the abstracted documents.

The general words are concisely given with any exceptions or reservations in full.

The sweeping clauses are invariably set out thus :—

And the reversion, &c.

And all the estate, &c.

And all deeds.

The *habendum* and *reddendum* (if any) should be accurately extracted.

The declaration of uses should be carefully set forth, and the exact words given, together with all the limitations.

The declaration of trusts should be fully stated, and if the trust be material to the title, it should be shown that that which was directed to be done has either been duly performed or failed of effect. If the purchaser is bound to see to the proper application of the purchase money, the trusts directing the application should be set forth.

from the first deed in which the farm is separated from the manor, or the close from the farm, and be fully described instead of passing under a general denomination.

2ndly, As often as there is any material variation in the description, either as to the name, quantity, or the like, which can, by any construction, vary the effect of the deed, or elucidate the identity of the parcels, such variations should be shown. As the said farm, &c. therein described as all that farm called or heretofore called , and now called or, as containing acres, or, as in the parishes of &c. or, as in the occupation of or, as having descended from to ; or, as having been devised by to .

The former circumstances are more particularly important when they connect the modern with the ancient description; and the latter circumstances are material only to show that the title has been acted on according to the former statement of the evidence, or these circumstances fill up a chasm in the evidence of the title; or afford notice of some circumstance which it may be proper to investigate.

In a well-prepared abstract, no more parcels should be introduced than those which are materially relevant to the title to be considered; and if one abstract be made for the use of divers purchasers, the parcels which are purchased by such purchasers respectively, or by the purchaser for whose use the particular abstract is delivered, should be pointed out by marginal observation, or by some notice; and this observation is equally applicable to each deed, &c. 1 Prest. Abs. 83 & 94.

Conditions for defeating the estate, and provisoes for redemption and reconveyance, and for cesser of terms, should be particularly noticed. Powers should be fully abstracted,¹²⁶ unless they are immaterial or become incapable of taking effect. The eviction and saving clauses of deeds of exchange should be fully abstracted. Usual covenants should merely be noticed, while special, unusual or qualified covenants should be fully abstracted. The covenants of a lease should be stated accurately, together with its commencement, and in the case of an underlease, the original lease should be given.

It should always be stated by whom the deed was executed, and if it were executed in exercise of any power, which required a particular mode of execution, it should appear from this part of the abstract that this mode of execution was observed; for example, if the deed be required to be signed, sealed, and delivered, it should appear to be signed, sealed, and delivered; and if any given number of witnesses were required to attest the execution, it should be noticed that the deed is attested by this number of witnesses, as far at least as respects the persons as to

(126) They should show at least the following circumstances, as far as such circumstances exist, and are expressed in the power :—

1st, The person or persons by whom the power is to be exercised.

2ndly, The mode of exercising the power, as by deed, will, &c. and the circumstances which are to attend such execution, as the attestation, &c.

3dly, The time at which the power is to be exercised, if any time be prescribed.

4thly, The consent or request, &c. which are essential to a valid execution of the power; and the mode in which such consent, request, &c. are to be expressed; as by deed, &c. to be attested by two witnesses, &c.

5thly, The act authorised by the power, as to sell, exchange, &c. together with the circumstances connected with the mode of executing the power, as to exchange for lands of equal or greater value, or for lands in a given country, or for lands of a given tenure, as freehold, copyhold, leasehold, or the like.

6thly, The person or persons in whose favour the power is to be exercised, as children, or a particular child; or objects of a given description, as children living at the death, &c. and the estate which may be appointed to them, if any particular estate is mentioned in the power; also whether the power is to be executed revocably or irrevocably, or the like. 1 Prest. Abr. 150.

whom such attestation was rendered necessary. An exact copy of the memorandum of attestation should be given. If the deed were executed by an attorney on behalf of any of the parties, then state the date and terms of this sealed authority,—that the principal was then alive, and that the attorney executed in the name of the principal.

The receipt of the purchase money, enrolment, and other endorsements, together with any memorandum of registration, livery of seizin, plans, &c. should be noticed.

The amount of the stamp should be named, in order that the purchaser's solicitor may ascertain that it is the proper stamp applicable to the particular document, at the time of its delivery.

Every interlineation and erasure should be mentioned.

7. The principal facts of a will to be abstracted are : Wills, Codicils, &c.

(1.) The date, with the name and description of the testator.

(2.) Devises and charges for the payment of debts, legacies, or annuities.

(3.) The enumeration of specified or scheduled debts.

(4.) The estates beneficially devised, and to whom, together with the limitations, conditions, &c.

(5.) The execution and attestation.

(6.) Testator's death, probate, registration, &c.

Codicils should be given in the order of their dates.

Administrations should be noticed as to their dates, the court granting them, and to whom, together with the sum of money under which the effects are sworn.

8. Private Acts of Parliament ¹²⁷ are sometimes resorted to as a mode of transfer by matter of record, to disentangle Private Acts of Parliament, &c.

(127) Private acts of parliament are a species of extraordinary assurances, calculated to give (by the transcendent authority of parliament) such reasonable powers or relief, as are beyond the reach of the ordinary courts of law.—Black. Anal.

an estate from a mass of confusion, to unfetter its owner, or to supply careless omissions, which the judicature cannot cope with. In abstracting these, there should be set forth :—

- (1.) The day the act passed or received the royal assent.
- (2.) Its title.
- (3.) The recitals, so far as they elucidate the title to the estate.
- (4.) The enactments.
- (5.) The indemnity to purchasers and saving clause.

Local inclosure acts are seldom abstracted, but a statement only is made of the lands allotted, for all inclosure acts are, in their provisions, nearly the same, *mutatis mutandis*. Any variation from the provisions of the general act, 6 and 7 Wm. IV. c. 115, extended by 3 and 4 Vict. c. 31, ought to be shown. It must be observed, however, that title under acts of parliament depends upon the particular language used; sometimes, indeed, a legal title is conferred without any formal conveyance.¹²⁸

An estate-act, or private act of parliament, rarely, if ever, meddles with the title, but simply leaves it alone, and this is particularly exemplified in inclosure acts, which, while they change the land, do not change the title, for the title which A has to his lands, or common rights at the time of allotment or exchange, is communicated to the land he receives under the allotments or exchanges; while, under a mere private act of exchange between individuals, each holds the lands under the title which attached to these lands prior to the exchange. He may therefore be evicted though the title to the lands he gave in exchange may be perfectly good. The characteristic of inclosure bills, acts for partition, exchange, &c. must be understood to be to make the lands which are received upon allotment, exchange, partition, &c. subject to the same estates and uses as the

(128) See on this point the 13 and 14 Vic. c. 60.

lands, &c. in respect of which the allotment, exchange, partition, &c. were made.

A title, therefore, under an enclosure act is frequently involved and difficult. A printed copy of the act should accompany the abstract.

In instruments subsequent to the enclosure act, it should clearly appear that the lands received in allotment are contained in them.

On an award under an enclosure act, these three things should be shown:—(1.) The title of the property as to which the allotment was made; (2.) the authority of the conveyance; and (3.) the enrolment of the award.¹²⁹

9. An abstract of a fine should set forth the term and the court in which it was levied, the names of the conusors and conusees, the kind of fine, description of the parcels, and the proclamations.

Fines, recoveries, suits, and bankruptcies.

A recovery should show the term in which it was suffered, names of the demandant, tenant, and vouchees, including the common vouchee, the parcels, together with the time at

(129) See 3 and 4 Wm. IV. c. 87. An allotment is no evidence that the person to whom it was made was seised in fee, as allotments may be, and frequently are made to tenants for life or other owners of partial estates. Great difficulties in titles derived through enclosure acts frequently arise, from the impossibility of determining in respect of which part of the lands or common rights belonging to the allottee at the time of the enclosure any given portion of the allotment was made. Thus, if a person have several open pieces of land held under distinct titles, and an allotment be made to him in general terms in lieu of all his lands in the parish, unless it can be shewn what part of the allotment was made in respect of each piece of open land, it is obvious that no title can be made to any part of the allotment without deducing the title to the whole of the lands which were subject to the enclosure, and an incumbrance or defect of title affecting any portion of the enclosed lands will affect the whole of the allotment, on account of the impossibility of distinguishing the exempted parts. Sometimes the surveys and papers in the hands of the clerk of the peace furnish the requisite information, but frequently they are not accessible. If the title to all the lands of the owner in question which were subject to the operation of the act be well deduced (evidence, of course, being given that the lands to which a title is shewn were all the lands), the title to every part of the allotment will be free from objection.—1 Sweet's Jarm. By the. p. 75.

which the writ of seisin was returnable, and seisin delivered.¹³⁰

As to Chancery suits, there should be set forth the time at which the proceedings were commenced, the names of the litigants, the decree, and all matters pursuant thereto, so far as they affect the title.

As to Bankruptcy proceedings, the date of the commission, *fiat*, or petition for adjudication (as the fact may be); the court, act of bankruptcy, adjudication, certificate of the appointment of assignees, and transfer of the property should be set out. So insolvent matters should be noticed.

(130) The general object of the abolished fines and recoveries, it should be remembered, was,

1st, To convey the estates of freehold or inheritance of married women.

2dly, With proclamations to operate by estoppel.

The peculiar operation of a fine was to gain a title by nonclaim, or to bar heirs in tail.

The peculiar operation of a common recovery was to bar reversions, and remainders expectant on an estate tail, and conditions and collateral limitations annexed to that estate. Consult 1 Sheppard's Touchstone, cc. 2 and 3, and 1 Prest. Conv. *passim*.

Questions upon the effect of a fine and nonclaim may still arise, in which the material inquiry will generally be, whether the party buying the fine had at the time an estate of freehold in the land—acquired either rightfully or by some one of the general modes of disseisin above mentioned—for if he were not in possession at all, or in possession as tenant at sufferance, or for any other merely chattel interest, the fine would be inoperative, as having been levied by a stranger to the freehold.—1 Sweet's Jarm. Bythe. p. 6.

CHAPTER VIII.

THE PERUSAL AND AUTHENTICATION OF THE ABSTRACT.

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| 1. Responsibility of the purchaser's solicitor.
2. Tests of a safe title.
3. The production of the muniments.
4. Examination of the abstract. | 5. Classes of doubtful titles.
6. The vendee's solicitor should not be captious, crotchety, or over-exacting.
7. Enquiries of third persons. |
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1. THE main and most responsible duty¹³¹ of the professional adviser of a purchaser or mortgagee is to take diligent care to ascertain that there exists such proofs of title in the seller or mortgagor of the property, that his client may hold it, with every reasonable expectation, of rebutting any claim, and preserving his lawful right.

Responsibility of the purchaser's solicitor.

(131) It is frequently necessary, first to decide whether a person be tenant in tail, tenant for life, or in fee; whether he be a joint-tenant, or tenant in common, or tenant by entireties; whether he has a vested or contingent remainder, or an interest by executory devise; whether he has a legal or an equitable estate; whether he has an estate or power, or an authority, before any safe or satisfactory conclusion can be drawn on the subsequent parts of the title.

Frequently, also, it is necessary to consider whether a person has an estate, or merely a right or title of entry, or of action; consequently, whether he is seised, or has been disseised; also, whether an estate which was vested has been divested; and whether an estate which existed has been discontinued or turned into a right of entry; whether a seisin which has been converted into a right or title, has been restored by entry, by action, or by that operation of the law which is called a remitter.

Also, whether a particular estate which existed has been determined by the lapse of time, or by filling the boundary by which it was circumscribed, or measure of time which it was to complete. Also, whether it has been determined by surrender, merger, or entry for a forfeiture, and whether an interest limited by way of contingent remainder, has been destroyed, released, or extinguished: and whether a more remote remainder or reversion has been barred under the ownership, which the law confers on the person who has a prior estate, being a learning peculiar to estates tail.—1 Prest. Abr. p. 210.

Tests of a
safe title.

2. It is plain that no person can lawfully deal with an interest which neither belongs to him, nor can be acquired by him, since *qui non habet ille non dat*, and, *nemo potest plus juris in alium transferre quam ipse habet*.

The two questions as to a safe title are these:—(1.) Whether a good title is deduced; and (2.) whether it is supported by adequate evidence; for, it is obvious, that one may be the rightful owner, and yet not have the means of proving it.¹³²

A good title is deduced:—

(1.) When there is a deduction of title to the legal estate;

(2.) When the legal estate can be obtained free from any equities affecting it;

(3.) When all the particular estates are either determined or can be conveyed to the purchaser or his trustees;

(4.) When no reversion or remainder is outstanding in the crown or in any strangers; and,

(5.) When there are not any incumbrances by way of condition or limitation over, mortgages, crown debts, judgments, statutes, decrees, *lites pendentes*, annuities, rents, legacies, portions, charges, dower, curtesy, bankruptcies, forfeitures, leases, &c. or any outstanding term of years which the purchaser cannot procure either to be extinguished or assigned.¹³³

In short, whenever it appears that upon certain acts done the legal and equitable estates in the property contracted for will become vested in the purchaser, those acts being such as the vendor can either himself perform or cause to be performed, then a good title exists.¹³⁴

The production of the muniments.

3. As soon as practicable, after the abstract of title is

(132) 1 Martin's Conv. p. 55.

(133) Ibid. p. 79.

(134) 8 Ves. 436; 16 Ves. 380.

delivered¹³⁵ to the vendee's solicitor, he should diligently compare it with the original documents. For this purpose they are usually produced at the chambers of the vendor's solicitor, or at the vendor's residence; if they are in town, the solicitor's agent should be instructed to undertake the comparison; but if they are in a distant part of the country, then the journey of the vendee's solicitor occasioned thereby will be at the vendor's expense, if there be no stipulation to the contrary.

If the title deeds are lost by fire or otherwise, after their examination by the purchaser's solicitor, but before the title has been accepted, the vendor must prove the contents of the deeds and documents, with their due execution.

Should the vendor have a covenant for the production of the title-deeds, he himself must obtain them for the vendee's inspection, since the holder might legally refuse to produce them to the vendee or his solicitor.

4. A great deal is comprehended in the perusal of an abstract. Examination
of the ab-
stract.

The purchaser's solicitor has a right to compare the abstract with the documents, and search for incumbrances before¹³⁶ the investigation of the title, and should the title

(135) If a perfect abstract be not delivered on the day named, it discharges the purchaser from any time-binding conditions, and releases him at law from the contract, and also in Equity, if he have required its delivery, without effect. Equity considers that the purchaser is bound to demand an abstract of the vendor's title, and, therefore, when time is of the essence of the contract, and the specified period is allowed to elapse without this demand being made, the condition as to time will be treated as avoided.—*Guest v. Homfrey*, 5 Ves. 818.

(136) The abstract ought to be verified, *i. e.* compared with the original deeds and documents themselves (and if erroneous, corrected) *before* it is submitted to counsel. In this respect, however, the practice is not uniform: some solicitors, relying on the accuracy of the abstract, defer verifying it until the opinion of counsel has been obtained, and sometimes even until the time appointed for executing the conveyance. But such delay, it is obvious, may often prove extremely prejudicial to the parties concerned. For, suppose a purchaser enter into a contract for re-sale *before* the abstract has been verified by his solicitor,

turn out to be defective, and the negotiation go off, the vendor must pay the expenses of such investigation and searches, where there is a written contract, and the deposit is, in all such cases, recoverable.

The perusal of the abstract relates (1) to its commencement, as whether it be carried back far enough, and whether the first document or fact be safe and satisfactory, and what evidence should be asked for under the peculiar circumstances of the given case ; and (2) to its contents. Here the whole learning of the laws of property is involved. The solicitor should especially examine the correctness of the abstract with the original documents, in order to see that

and from a subsequent examination of the title-deeds, it appears that the title is, in fact, unmarketable, he could not recover from the vendor those costs which he has himself incurred, and become liable to pay by reason of the sub-sale; being under such circumstances entitled only to his deposit and interest, with such expenses as are a *necessary* consequence of the original contract ; as, *e. g.* searching for judgments, perusing and verifying abstract, counsel's opinion, &c. But costs incurred in surveying the estate, preparing the conveyance in anticipation of the purchase being completed, or in filing a bill for specific performance, are not considered as necessary consequences of the contract, and cannot be recovered. It has, indeed, been doubted, even if the abstract be first verified, whether in that case the purchaser would be entitled to recover the costs incident to his sub-contract; for, according to Mr. Justice *Littledale*, it is contrary to the policy of the law, that a man should offer an estate for sale before he has obtained possession and a conveyance. Mr. Justice *Bayley*, however (a great authority, particularly on all questions of this kind), considered, that if the abstract has been examined with the deeds and found correct, the purchaser will be justified in acting on the faith of having the estate, and that if after that time a sub-contract is made, he will be entitled to recover the expenses attending it, if it fail in consequence of any defect of title. And if there were *mala fides* in the original vendor, then, but not otherwise, the purchaser may recover, not only the expenses incident to the sub-contract, but also such *profit* as would have accrued to him had it been carried into effect. It ought also to be borne in mind, that to delay verifying the abstract until the opinion of counsel has been obtained, may not only, as we have seen, prove injurious to the purchaser, but amounts to "professional negligence;" for, if *by reason* of the abstract not having been first verified, the counsel formed a wrong opinion of the title, which was acted upon by the solicitor, the latter would be held answerable to his client for any damages which he might in consequence sustain.—1 *Martin's Conv.* by Davidson, pp. 46 and 47 ; and see *Walton v. Moore*, 10 Bar. and C. 416, *et seq.*

nothing material is omitted ; that the forms of assurance are appropriate ; the parties competent to convey ; the consideration adequate ; the operative words technically correct ; the property rightly limited ; the instruments duly executed, memorialized, and registered, and the parcels clearly identified.¹³⁷

In considering the several parts of a deed, the following hints should be borne in mind.

Recitals are evidence against the parties, who are estopped by them ; it should be ascertained that recitals are not contrary to the operative part, since the deed would be thereby vitiated.

The consideration should be paid to those competent to give a discharge for it, so as to exonerate the property from its incumbrance. The failure of the consideration in an annuity-deed vacates the transaction.

That the grantors are fully competent, laboring under no disability, and have used sufficient operative language to pass their interest. That trustees have strictly pursued their powers.

A proper identification of the parcels throughout all the deeds, and that the description of the property is true and certain, or capable of being reduced to a certainty.

There are two rules, which should be observed in every *habendum* :—(1) That it do not contradict, nor be repugnant to, nor abridge the estate granted in the premises, which, however, may be enlarged by it ; (2) In the grant of a freehold, it must be from the time of the execution of the deed, and not from a future time.

That purchasers are properly absolved from seeing to the application of their purchase money, in the case of a power or trust to sell.

(137) It may be safely asserted, that there is no defect which more frequently renders it impossible for a person who has a good title to prove it, or enables a party who has a bad title fraudulently to exhibit a colourable ownership, than the want of evidence of the identity of the parcels. — 1 Martin's Conv. B. 1, c. 11.

Unusual covenants should be noticed as to their extent and legal operation, more particularly with regard to any exceptions therein contained.

That all the solemnities of execution, attestation, receipt-endorsement and enrolment have been duly observed.

That every incumbrance has been removed and every charge discharged.

Settlements and wills should be perused from beginning to end, that no clause in anywise affecting the title, escape attention.

Classes of doubtful titles.

5. There are, at least, three species of doubtful titles: (1) where the title is doubtful by reason of some uncertainty in the law itself; (2) where the doubt is as to the application of some settled principle or rule of law; and (3) where a matter of fact upon which a title depends is either not in its nature capable of satisfactory proof, or being capable of such proof, is yet not satisfactorily proved.¹³⁸

The vendee's solicitor should not be captious, crotchety, or over-exacting.

6. A vendee's solicitor should never require more documents or evidence than he is strictly entitled to; but yet he should take care to procure every proper testimony, that all difficulty of substantiating the title on a future dealing with the property by his own client may be obviated. Very little encouragement is given to a negligent purchaser, who seeks, in the Court of Chancery, and in the absence of any fraud and misrepresentation, to repair defects in his title, after the completion of the contract. The covenant for further assurance does not entitle a purchaser to call for evidence material to his title at the time of his

(138) A Court of Equity will not compel the acceptance of a title, when there is a reasonable doubt either in law or in fact. *Sir John Leach*, 6 Madd. 67, *Emery v. Grocock*. *Smith v. Death*, 5 Madd. 372.

purchase, or to have the production of the documents, containing such proofs secured to him.¹³⁹

7. Whenever the deeds are in the possession of third parties, they should be informed of the negotiation to purchase the estate to which they relate, and an enquiry should be made of them respecting their particular interests therein. Such an inquiry should also be made of tenants or persons in possession, when the leases under which they hold cannot be inspected. If the property be vested in trustees, enquiries should be made of them as to any incumbrances, and they should have notice of the intended purchase, in order to exclude a subsequent purchaser or incumbrancer, since priority of notice gives priority of equity.

Enquiries
of third
persons.

Of course, those persons, to whom these questions are put, will be bound by their answers; but, an incumbrancer need not satisfy any enquiry relative to his surety, in the absence of an offer to satisfy him his claim.

(139) *Hallett v. Middleton*, 1 Russ. 243, 256.

If an opinion on the title have been obtained, it is then the duty of the purchaser's solicitor to see that the various requisitions of counsel are complied with. If the vendor's answers are unsatisfactory, or occasion any difficulty in the mind of the solicitor, it is the usual practice to lay the abstract again before the same counsel, to advise on the sufficiency of such answers. If any difference of opinion still exist, the points in question are commonly submitted to the vendor's counsel; and thus the subject is thoroughly discussed. But, if the respective counsel cannot agree, the contract is then either rescinded, or made the subject of an action or suit. It often happens, however, that instead of involving themselves in litigation, the parties agree to submit the points in dispute to the arbitrament of some eminent practitioner, agreeing to be bound by his opinion, whatever that may be. And it is astonishing to one who has considered the subject how much litigation is prevented by having recourse to this species of domestic forum; indeed, it has been said, (and I believe truly) that the greatest proportion of the questions which arise upon the laws of real property, are determined by the opinions and consultations of conveyancers. Hence the respect which is uniformly shewn by the courts to the settled practice of conveyancers, which, according to Lord Eldon, is "a very considerable authority." 1 Mart. Conv. by David, pp. 48, 49.

CHAPTER IX.

THE PROPER SEARCHES TO BE MADE BY THE SOLICITOR OF
A PURCHASER OR MORTGAGEE.

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| <ol style="list-style-type: none"> 1. A Solicitor is responsible for neglect. 2. <i>Judgments.</i> 3. Present law—1 & 2 Vict. c. 110, 3 & 4 Vict. c. 82. 4. Operation of 1 & 2 Vict. c. 110. 5. In favor of what persons the old law is still in force—2 & 3 Vict. c. 11. 6. Sketch of the old law. 7. Caution as to judgments. 8. <i>Crown-debts.</i> 9. <i>Certificates of married women's acknowledgments.</i> | <ol style="list-style-type: none"> 10. Doctrine of <i>lis pendens</i>—2 & 3 Vict. c. 11. 11. Copyholds. 12. Register-districts. 13. Documents requiring registration. 14. Exceptions. 15. Principle of the local register-acts. 16. Entailed estates. 17. Annuities. 18. Bankruptcy—12 & 13 Vict. c. 106. 19. Insolvency—1 & 2 Vict. c. 110. 20. Time for making these searches. |
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A solicitor is responsible for neglect.

1. THERE are several searches, under particular circumstances, that the solicitor of a purchaser or mortgagee should institute on behalf of his client in order to fortify his title ; and these ought never to be neglected, for a solicitor will be liable in damages to his client, who shall sustain any injury by reason of his omitting or neglecting to make such investigation.¹⁴⁰

Judgments.

2. The most important of the searches is for judgments. In consequence of the anxiety of the legislature to preserve to purchasers, unaffected by notice, that protection from judgments, which the old law afforded to them, in

(140) Should a client request these searches to be waived, his solicitor should have such request reduced into writing and signed, in order to secure himself from all responsibility.

order to encourage and render safe the purchase and circulation of property, the subject of judgments as they affect realty is at once difficult and involved. We will here attempt a succinct view of it.

3. The present Statute-Law, then, with regard to judgments, is as follows.

As to the execution of *elegit*:—By 1 & 2 Vict. c. 110,¹⁴¹ § 11, after reciting that “the existing law is defective in not providing adequate means for enabling judgment-creditors to obtain satisfaction from the property of their debtors, and that it is expedient to give judgment-creditors more effectual remedies against the real and personal estate of the debtors than they possess under the existing law:” enacts,

“That it shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment¹⁴² which at the time appointed for the commencement of this act (1st Oct. 1838) shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty’s superior courts at Westminster, to make and deliver execution unto the party in that behalf suing, of *all* such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall

Present law
—1 & 2 Vict.
c. 110, 3 & 4
Vict. c. 82.

(141) This is a long and important Act, relating to arrest on mesne process in civil actions, to a creditor’s remedies against his debtor, and to the relief of insolvents; we only print those portions of it, which affect the subject under discussion.

(142) This Act also enacts (§ 17):—“That every judgment debt shall carry interest at the rate of *four pounds per cent. per annum* from the time of entering up the judgment, or from the time of the commencement of this act [1st Oct. 1838] in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.”

have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have *any disposing power which he might, without the assent of any other person, exercise for his own benefit*, in like manner as the sheriff or other officer may now make and deliver execution of *one moiety* of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by *elegit* is now subject to in a court of equity."

" Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform, and render to the lord of the manor or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied.

" Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such *before* the time appointed for the commencement of this act, [1 Oct. 1838] such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this act had not passed."

As to the effect of the judgment: the 13th § of the same act enacts:—

“That a judgment already entered up or to be hereafter entered up against any person in any of her Majesty’s superior courts at Westminster shall operate as a *charge* ¹⁴³

(143) The act also provides that a judgment shall become a charge upon government stock and shares in public companies belonging to the debtor, under the circumstances following:—

“If any person, against whom any judgment shall have been entered up in any of her majesty’s superior courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment-creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment-creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment-debtor: provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of *six calendar months* from the date of such order.—(§ 14.)

“And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares, hereby authorised to be charged for the benefit of the judgment-creditor under an order of a judge, be it further enacted, That every order of a judge charging any government stock, funds or annuities, or any stock or shares in any public company, under this act, shall be made *in the first instance ex parte* and without any notice to the judgment debtor, and shall be an order to shew cause only; and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment-debtor in his own right, or in the name of any person in trust for him, is or are to be effected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or, in case of corporations, to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment-creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment-debtor in the mean time shall be valid or effectual as

upon all land, tenements, rectories, advowsons, tithes, rents, and hereditaments, (including lands and hereditaments of *copyhold* or *customary tenure*) of or to which such person shall, *at the time of entering up such judgment*, or at any time afterwards, be seised, possessed or entitled, for any estate

against the judgment-creditor; and further, that unless the judgment-debtor shall within a time to be mentioned in such order shew to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute.

“ Provided that any such judge shall, upon the application of the judgment-debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.”— (§ 15).

The 3 and 4 Vict. c. 82 § 1, after reciting this 14th section, enacts, “ That the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment-debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities or shares as aforesaid, as also in the dividends, interest or annual produce of any such stocks, funds, annuities, or shares; and whenever any such judgment-debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities, or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant General of the Court of Chancery, or the accountant General of the Court of Exchequer,* or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment-debtor: Provided always, that no order of any judge as to any stock, funds, annuities, or shares, standing in the name of the Accountant General of the Court of Chancery, or the Accountant General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and company of the Bank of *England*, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery, or the Court of Exchequer respectively, may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment-creditor, with the amount of the sum to be mentioned in any such order.”

* The equity side of this Court no longer exists. See 5 Vict. c. 5.

or interest whatever, *at Law or in Equity*, whether in possession, reversion, remainder or expectancy, or *over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit*, and shall be binding as against the person against whom judgment shall be so entered up, and *against all persons claiming under him after such judgment*, and shall also be binding as *against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest* into or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment-creditor shall have such and the same remedies *in a court of equity* against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to, in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt, and interest thereon :

“ Provided, that no judgment-creditor shall be entitled to proceed in equity to obtain the benefit of such charge *until after the expiration of one year* from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this act, [1st. Oct. 1838,] until after the expiration of *one year* from the time appointed for the commencement of this act, nor shall such charge operate to give the judgment-creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up *one year* at least before the Bankruptcy.

Provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, (1 Oct. 1838) such

judgments shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed :

“ Provided also, that nothing herein contained shall be deemed or taken to alter or affect *any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice.*”

It is to be observed that the creditor relinquishes all unrealized securities, if he arrest the person of the debtor in satisfaction of his judgment-debt, the act providing :—
“ That if any judgment-creditor, who under the powers of this act shall have obtained any charge or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment-debt, *cause the person of the judgment-debtor to be taken or charged in execution upon such judgment*, then and in such case such judgment-creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly.”—(§ 16.)

The following proceedings are to have the effect of judgments, under the particular circumstances set forth :—“ *all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the court of Review¹⁴⁴ in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person*, shall have the effect of judgments in the superior courts of Common Law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to

(144) The Court of Review was abolished on the 15th Sept. 1847, by 10 & 11 Vict. c. 102 and its jurisdiction transferred to the Vice Chancellor sitting in Bankruptcy. See 12 and 13 Vict. c. 106, §§ 12—18, and also §§ 123 and 248.

the judges of the superior courts of Common Law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the court of review¹⁴⁵ in matters of bankruptcy, and by the Lord Chancellor in matters of Lunacy; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid." (§ 18.)

In order that these judgments, decrees and orders may affect realty, under this act, it provides:—"That no judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall, by virtue of this act, affect any lands, tenements or hereditaments, *as to purchasers, mortgagees, or creditors*, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order or rule, and the account of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left¹⁴⁶ with the senior master of the court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of five shillings; and all persons shall be at liberty to search the same book on payment of the sum of one shilling. (§ 19.)

(145) Vide the last note.

(146) Vide post, p. 627, as to the necessity of re-registering every five years.

The 3 & 4 Vict. c. 82, § 2, after reciting this 19th § and that doubts have been entertained whether a purchaser, mortgagee, or creditor, having notice of any such judgment, decree, order, or rule as aforesaid, would not in equity be affected thereby, notwithstanding such a memorandum or minute of the same as in the said Act is mentioned may not have been left with the senior master of the said Court of Common Pleas, declares and enacts, “That no such judgment, decree, order, or rule as aforesaid, shall by virtue of the said Act affect any lands, tenements, or hereditaments, at law or in equity, *as to purchasers, mortgagees, or creditors, unless and until* such a memorandum or minute as in the said Act in that behalf mentioned shall have been left¹⁴⁷ with the senior master of the said Court of Common Pleas at *Westminster*; any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in anywise notwithstanding.”

The provisions of this act are extended to the counties palatine, its 21st § enacting :—

“That all the remedies, authorities, and provisions of this act applicable to her Majesty’s superior courts of common law at Westminster, and the judgments and proceedings therein, shall extend to and be applicable to the court of Common Pleas of the county palatine of Lancaster, and the court of Pleas of the county palatine of Durham, within the limits of the jurisdiction of the same courts respectively;

(147) The phraseology of the Act 1 & 2 Vict. as to the terms upon which judgments shall bind purchasers, should be attended to, for although it provides that no judgment, &c. shall by virtue of the act bind a purchaser, unless a minute of the particulars required shall be left with the Senior Master of the Common Pleas, yet it does not go on to say, nor unless he shall enter the particulars in a book, but directs him to make the entry. A purchaser, therefore, might be bound if the creditor had performed his part, although by the negligence of the officer the judgment had not been entered in the book, and the only remedy would be against the officer for his neglect. This shows the propriety of the protection given to purchasers without notice. 2 Sug. V. and P. p. 404.

and the judgments of each of the said last mentioned courts shall, within the limits of the jurisdiction of the same courts respectively, have the same effect in all respects as the judgments of any of her Majesty's said superior courts at Westminster under and by virtue of this act; and all powers and authorities hereby given to the judges or any judge of her Majesty's superior courts at Westminster with respect to matters depending in the same courts, shall and may be exercised by the judges or any judge of the said court of Common Pleas at Lancaster, or the justices or any justice of the said court of Pleas at Durham, with respect to matters therein depending, and within the jurisdiction of the same courts respectively.

“ Provided always, that no judgment of either of the same last-mentioned courts shall, by virtue of this Act, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and title, trade, or profession of the plaintiff and defendant, the date when such judgment was signed, and the amount of the debt, damages, and costs thereby recovered, shall be left with the prothonotary or deputy prothonotary, or some other officer to be appointed for that purpose by the said courts respectively, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is to be affected thereby, and such officer shall be entitled for every such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book on payment of the sum of one shilling.

“ And provided also, that no order or other proceeding under this act made by any justice or justices of the said Court of Common Pleas of the county Palatine of Lancaster, or the Court of Pleas in the county Palatine of Durham shall be valid or effectual, except made in open court, on one of the court or return days of the same court,

or except such justice or justices shall be also a judge or judges of one of the said Courts of Westminster.”¹⁴⁸

For the removal of judgments, &c. from inferior courts of record into the superior courts, for the purpose of giving them the like efficacy as superior judgments, &c. the act enacts:—“That in all cases where final judgment shall be obtained in any action or suit in any inferior court of record in which at the time of passing of this Act [1st. Oct. 1838] a barrister of not less than seven years standing shall act as judge, assessor, or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid, whereby any sum of money or any costs, charges, or expenses, shall be payable to any person, it shall be lawful for the judges of any of her Majesty’s superior Courts of Record at Westminster, or if such inferior court be within the county Palatine of Lancaster, for the judges of the Court of Common Pleas at Lancaster, or for any judge of any of the said Courts at Chambers, either in term or vacation, upon the application of any person who at the time of the commencement of this act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges, or expences, shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule, or order, as the case may be, being respectively under the seal of the inferior court, and signature of the proper officer thereof, to order and direct the judgment, or, as the case may be, the rule or order, of such inferior court to be removed into

(148) The concluding provision of this section relates to bail; it is:—“Provided also, that no order directing any person or persons to be held to bail under this act, nor any order for discharging out of custody any person or persons arrested under this act, shall be made by any justice or justices of the Court of Pleas in the county Palatine of Durham who shall not be a judge or judges of one of the said Courts of Common Law at Westminster.”

the said superior court, or into the Court of Common Pleas at Lancaster, as the case may be, and immediately thereupon such judgment, rule, or order shall be of the same force, charge, and affect as a judgment recovered in, or a rule or order made by such superior court, and all proceedings shall and may be immediately had and taken thereupon, or by reason or in consequence thereof, as if such judgment so recovered, or rule or order so made had been originally recovered in or made by the said superior court, or into the Court of Common Pleas at Lancaster as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment or rule or order.

“Provided always, that no such judgment, or rule or order, when so removed as aforesaid, shall affect any lands, tenements, or hereditaments, *as to purchasers, mortgagees, or creditors*, any further than the same would have done if the same had remained a judgment, rule, or order of such inferior court, *unless and until* a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same.” (§ 22.)

4. It will be observed that this Act, 1 & 2 Vict. c. 110, does not repeal the prior acts concerning judgments; thus leaving a judgment-creditor the option of proceeding under them, should he like. But it extends the judgment-creditor's remedy, by *elegit*, to the whole of his debtor's lands, including his copyholds, and leaseholds,¹⁴⁹ and whether his interest in them be legal or equitable, and converts the creditor's general lien into an actual charge on his debtor's estates. An appointment divesting a vested estate in the debtor can no longer defeat a judgment entered up against him, after the creation of the power;¹⁵⁰ and a judgment

(149) 2 Sugd. V. and P. p. 401.

(150) But still a power of appointment to be executed by the debtor jointly

Operation of
1 & 2 Vict.
c. 110.

against a tenant in tail binds his issue in tail, or any expectancy, which he might have barred, without the consent of a protector to the settlement, pursuant to 3 & 4 Wm. IV. c. 74. The estate of a joint-tenant-debtor is now extendible against the surviving joint-tenant, and not merely for such debtor's life, as under the old law.

Perhaps, an equity of redemption cannot be taken under a common-law writ of execution;¹⁵¹ but a judgment becomes a charge thereon pursuant to the 1 & 2 Vict. c. 110.

A judgment-creditor, who has entered up his judgment twelve months before the filing of a petition of adjudication against his bankrupt-debtor, is deemed an equitable mortgagee.

Of course, a judgment cannot avail against property, which the debtor holds in trust for others, or against a prior equitable incumbrancer.¹⁵²

A judgment is a charge on an annuity issuing out of land, and so, it would appear, on a legacy charged on realty. And it is still a charge on unpaid purchase-money, and on the surplus proceeds of a sale by a mortgagee.

In favor of
what persons
the old law is
still in force
—2 & 3 Vict.
c. 11.

5. Touching, however, purchasers and mortgagees, who have had *no notice* of subsisting judgments, the old law is in force, for whilst the two last provisions of the 13th § of the 1 & 2 Vict. c. 110,¹⁵³ preserved the great principle of equity, shielding *bonâ fidé* purchasers, without notice, from any incumbrancer, the senate, in its wise solicitude, made assurance doubly sure, and passed the 2 & 3 Vict. c. 11, which

with, or with the consent of, another person, is not within 1 & 2 Vict. c. 110, § 11; and therefore an appointment under such a power, created before the date of the judgment, will defeat the creditor's execution at law, since the appointment overreaches the equitable estate (which is now liable at law) as well as the legal estate. *Skeeles v. Shearley*, 3 Myl. and Cr. p. 112. See 1 Hayes's Conv. pp. 327.

(151) 5 Sweet's Jarm. Bythe. p. 41.

(152) *Whitworth v. Gaugain*, 3 Hare. p. 416. 1 Phil. p. 728. And this principle also applies to personalty; *Newland v. Paynter*, 4 Myl. and Cr. p. 408, and *Langton v. Horton*, 1 Hare, p. 549.

(153) *Vide ante*, p. 619.

fully and unmistakably secures this equitable justice to them, as well as every benefit under the old law.

That statute first enacts that no judgment after 4th June 1839, shall be docketted pursuant to 4 & 5 W. and M. c. 20 (§ 1); it then enacts, that no judgment, already docketted, shall, after the 1st Aug. 1841, affect any lands, tenements, or hereditaments as to purchasers, mortgagees or creditors, unless registered pursuant to 1 & 2 Vict. c. 110 (§ 2): a provision, which, it would seem, will not protect purchasers or mortgagees *with notice*. The date when the memorandum of any judgment, &c. is left with the senior master of the Court of Common Pleas, must be inserted by him in the judgment-book (§ 3); and, a registry of such judgment, &c. made *every five years* in order to keep it in force.¹⁵⁴ (§ 4.)

The next section is important: it is "that as against purchasers and mortgagees *without notice* of any such judgments, decrees or orders, rules or orders, as aforesaid,¹⁵⁵ none of such judgments, decrees or orders, rules or orders shall bind or affect any lands, tenements, or hereditaments, or any interest therein, further or otherwise or more extensively in any respect, *although duly registered*, than a judgment of one of the superior courts aforesaid would have bound such purchaser or mortgagee before the said act of the first and second years of the reign of her present Majesty, where it had been duly docketted according to the law then in force." (§ 5.)¹⁵⁶

(154) This section is confined to the registry of the Common Pleas, at Westminster, and does not in words comprehend judgments in the Courts Palatine, which may perhaps be held not to be within it. A search, therefore, in these local courts ought to be carried back ten years from the day of searching, or ten years from the earliest registered judgment (if any).

(155) A doubt has been started that judgments in the Courts Palatine are not within this act, and that such judgments will bind purchasers or mortgagees without notice, if registered pursuant to 1 & 2 Vict. c. 110. Dart's Compendium, p. 240; *sed quære*.

(156) The sixth section provides for the non-revival of extinct judgments, and the remaining sections to other subjects, which will be presently noticed in the text.

Sketch of the
old law.

6. It becomes then necessary, briefly to enquire what property judgments under the old law affected; seeing that, as against purchasers and mortgagees, who are without notice, a judgment-creditor can only avail himself of the powers afforded to him by such law.

The leading principle was this:—a judgment was a charge upon the debtor's property by way of general lien, from its date, *in equity*,¹⁵⁷ provided notice of it were given; while *at law*, it was only from its docketting.¹⁵⁸

A judgment leads to an execution.

An execution by *elegit*¹⁵⁹ only executed a *moiety* of the

(157) Equity would assist a judgment-creditor by allowing him to redeem a subsisting mortgage, by appointing a receiver, or by paying off the judgment or giving him his legal priority, where, under any circumstances, the lands of the debtor were being sold by the Court, or became subject to administration.

(158) A judgment-creditor has at law, by the Statute of Frauds, execution against the equitable freehold estate of the debtor in the hands of his trustees, provided the debtor have the whole beneficial interest; but if he have a partial interest only in his equitable freehold estate left, the judgment-creditor has no execution at law, though he may come into a Court of Equity and claim there the same satisfaction out of the equitable interest as he would be entitled to at law, if it were legal. Every *voluntary* assignee of the equitable interest of the debtor, will be in the same situation with respect to the claim of the judgment-creditor as was the debtor himself. Every assignee for a valuable consideration will hold the equitable interest discharged of the claim of the judgment-creditor, *unless* he have notice of it before his consideration is paid." Per Sir John Leach in *Forth v. Duke of Norfolk*, 4 Mad. 504.

(159) An *elegit* under two judgments of the same term, obtained either by one or two creditors, executed the whole of the estate.

This writ of execution was framed under Stat. 13 Edw. I. § 1, c. 18, (West. 2nd) and is so called from the entry upon the Rolls, *Quod elegit sibi executionem fieri de omnibus catallis et medietate terræ*. On the suing out of this writ, the sheriff was to empanel a jury to make inquiry of *all* the goods and chattels of the debtor, and to appraise the same, and to make the same inquiry as to his real property, and upon such requisition to *deliver* all the goods and chattels, and a *moiety* of the lands, to the plaintiff, by metes and bounds, at the appraised value. The inquisition must find the lands with certainty, their value, the place and county where they lie, and where the inquisition is taken, and also the estate of the defendant, as for instance, whether he is seised absolutely or for a limited interest, and in severalty, or as a joint-tenant or tenant in common. As to an estate by *elegit*, see *ante*, p. 87.

debtor's freeholds, ancient demesnes, rent-charges, estates for the support of dignities, impropriate tithes, (for they were in fact temporal inheritances) and terms of years; whether held in severalty, coparcenary, or in common; or in joint-tenancy, but then during the life of the joint-tenant-debtor only; or in reversion¹⁶⁰, or estates held in trust for the debtor at the time of such execution issued.¹⁶¹

Between judgments affecting the legal estate, and judgments affecting only the equitable interest, there is a marked and characteristic difference. Without regard to the point of notice, or no notice, a judgment-creditor, whose lien is against the legal estate, may pursue his remedy notwithstanding a sale, though the sale be *bonâ fide* and without notice; while a judgment-creditor whose lien affects the equitable estate only, may be disappointed by a subsequent conveyance made by the trustee and his *cestui que* trust.

Terms of years might have been wholly sold¹⁶² to the creditor, at an appraised sum, as part of the debtor's personality; and it should be noted that *as against* purchasers, they were not bound until the writ was actually delivered to the sheriff in order to be executed.¹⁶³

(160) If the property be a reversion expectant upon a lease for lives or for years, and the reversioner is entitled to a rent in respect of the lease, the creditor might extend a moiety of the reversion and a moiety of the rent. 1 Rol. Abr. 894.

(161) 29 Car. II. c. 3, § 10. A mere equitable interest in a term of years has been held not to be within this Act. *Scott v. Scholey*, 8 East. 467.

(162) If the debtor tender the money at the time of the appraisement, and before the delivery of the term, or even afterwards in Court, the term may be saved. But if no such tender be made, the property in the term is altered by the delivery of the sheriff, and the creditor may either keep or dispose of it, without being accountable for the profits.

(163) But the sheriff would not permit his office to be searched for any writ of execution which might have been delivered there, lest the purposes of the writ should be defeated by the party against whom it was issued absconding or removing his goods. Therefore, although the judgment did not of itself bind the leasehold estate, yet a purchaser could not safely complete his contract where he discovered a judgment, because he could not be satisfied that

But the old law did not affect advowsons in gross, glebe-lands, rents-seck, copyholds (except, perhaps, leases thereof, granted by license or under a special custom), the estates of a tenant in tail, or joint tenant, beyond his life; or a wife's lands for her husband's debts, beyond coverture.

It is doubtful whether customary freeholds were exempted.

A subsequent appointment defeated a prior judgment recovered after the power was created.¹⁶⁴

This, then, being the old law, it became a practice amongst conveyancers to assign an old satisfied term of years to a trustee, in order to protect a purchaser or mortgagee, unaffected with notice, from all *charges* that may have arisen after the creation of such term and before the purchase or mortgage; or in other words, from all *mesne incumbrances*.

But a purchaser was never advised to rely altogether upon such a protection, because, notice of a judgment either to him, his attorney or agent, might have been presumed from slight circumstances, and, besides, incumbrances created prior to the creation of the term assigned, would have bound him. A search in the proper office for judgments was, in every case, recommended.¹⁶⁵

an execution issued upon it had not been lodged with the sheriff. Sugden's V. & P. p. 393.

(164) Where lands are conveyed to such uses as A shall direct or appoint, with a limitation to himself in fee in default of appointment, an appointment by A, in exercise of his sole power, divests his ulterior estate, and the appointee claims immediately under the instrument by which the power is limited. Upon this principle an appointment defeated all judgments which were entered up against the donee of the power after its creation, even without notice of them. But see *ante*, p. 625, as to the present law.

(165) The rule of ordinary practice was to search for judgments for ten years, and to carry the search into a period of ten years from any judgment, which may from time to time be found. Extraordinary or suspicious cases may have called for a greater latitude of search. 3 Prest. Abr. 336. The old law of judgments is very ably treated of in Mr. Prideaux's work on Judgments, pp. 1—62.

A purchaser, who had not paid all the purchase money,¹⁶⁶ and had had notice of a judgment, could never safely pay the remainder to the vendor, unless the judgment were discharged, or a proper indemnity given to him, because, after such notice, a judgment became a lien upon the unpaid purchase-money.

7. The whole law of judgments, in their relation to realty, is of so uncertain and unsatisfactory a character, as to suggest the caution of always¹⁶⁷ searching for judgments, rules, decrees or orders on behalf of purchasers and mortgagees, since, besides that notice may peradventure be brought home to them when least anticipated, such an examination would set their title in a clearer point of view on a future dealing with the property.

This search is made in the registry-office of the Court of Common Pleas, in Chancery Lane, London, for a period of five years next preceding the time of search. Should

(166) Articles made for a valuable consideration, and *the money paid*, will in equity bind the estate, and prevail against any judgment-creditor *mesne*, betwixt the articles and the conveyance; but this must be where the consideration paid is somewhat adequate to the thing purchased; for if the money paid is a small sum in respect of the value of the land, that shall not prevail over a *mesne* judgment creditor. Lord Cowper, 1 P. Wim. 282. The docketting of a judgment under 4 & 5 W. & M. c. 20, and registering it, if the debtor's lands were in a register-locality, were necessary to affect purchasers and mortgagees: in Equity, however, this omission was cured, provided the purchaser or mortgagee had had notice, either actual or constructive, at the time of the contract for the purchase or loan.

(167) With respect to the protection afforded by an outstanding legal estate, it should be observed that, ordinarily, purchasers and mortgagees cannot be advised to rely on such protection, but should make the proper searches, partly, because the purchaser may be fixed with notice, or at least be involved in a contest for priority, and partly because a subsequent purchaser, with notice, may object that his safety would depend upon a fact incapable of proof, namely, the absence of notice in his vendor. Cases, however, sometimes occur, in which, there being a legal estate or legal power capable of affording protection to a purchaser without notice, all inquiry is studiously avoided, lest the discovery of judgments, which could not be satisfied, should prevent the completion of a desirable purchase or lease. 1 Hayes's Conv. p. 381.

the property lie within Durham or Lancashire, then it will also be necessary to search the registry of the Palatine Court.¹⁶⁸

Crown-debts. 8. Whenever it is apprehended that the vendor or mortgagor may be a debtor to the Crown, or a surety for such a debtor, a search for Crown-debts should be made. It is, however, done by some practitioners as a matter of proper precaution.¹⁶⁹

The places to be searched to ascertain the existence of any Crown-debts created or secured before the 4th June, 1839, are the Exchequer-office, and the Tax-office among the Receiver-general's bonds. Since that date the 2 Vict. c. 11 has effected the following regulations:—

“That no judgment, statute, or recognizance, which shall hereafter be obtained, or entered into in the name or upon the proper account of her Majesty, her heirs, or successors, or inquisition by which any debt shall be found due to her Majesty, her heirs, or successors, or obligation or specialty which shall hereafter be made to her Majesty,

(168) A judgment does not affect property lying in Middlesex and Yorkshire, as against purchasers or mortgagees *without notice* of it, unless it is inserted in the local registry.

The Statutes relating to these registrations give different times from which judgments are to bind lands. In Middlesex they bind from the day of the memorial entered.* In the North Riding of Yorkshire, registry within twenty days after judgment signed, binds from the day on which it was signed.† In the East and West Ridings of Yorkshire and Kingston-upon-Hull, a judgment will bind lands from the day of signing it, if memorialized within thirty days thereafter.‡

It is now unnecessary to search for judgments in these local registers.

(169) Even a prior legal term of years assigned to a trustee for a purchaser to attend the inheritance, cannot be relied upon, although he purchased without notice; but where the term never was held in trust for the Crown-debtor, it may be used as a defence against the Crown-debt. And where a man is an accountant to the Crown, even his future debts would bind the estate which he had at the time he was such accountant in the hands of a purchaser.--2 Sug. V. and P. 411; Connell on this subject, *Prideaux on Judgments*, pp. 148--186; or 5 Sweet's *Jarm. Bythe*. 64 f--79.

* 7 Anne c. 20, § 18.

† 8 Geo. II. c. 6, § 33.

‡ 5 & 6 Anne c. 18, § 11, and 6 Anne c. 35, § 38.

her heirs, or successors, in the manner directed by an act passed in the thirty-third year of the reign of his late Majesty King Henry the Eighth, [cap. 39] intituled, ‘The erection of the court of surveyors of the King’s lands, and the names of the officers there, and their authority,’ or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the act passed in the thirteenth year of the reign of her late Majesty Queen Elizabeth, [cap. 4] intituled, ‘An act to make the lands, tenements, goods and chattels of tellers, receivers, *et cætera*, liable to the payment of their debts,’ shall affect any lands, tenements, or hereditaments, *as to purchasers or mortgagees, unless and until* a memorandum or minute, containing the name, and the usual or last place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and also in the case of any judgment, the court and title of the cause in which such judgment shall have been obtained, and the date of such judgment, and the amount of the debt, damages and costs thereby recovered; and also in the case of a statute or recognizance, the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also in the case of an inquisition, the sum thereby found to be due, and the date of the same, and also in the case of an obligation or specialty, the sum in which the obligor shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office, the name of the office, and the time of the officer accepting the same, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled ‘The index to debtors and accountants to the crown,’ in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute, or recognizance, inquisition, obligation, or specialty, or the acceptance of any

office; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, and also the other book to be kept according to the provisions of the said recited act of the first and second years of the reign of her present Majesty, or either of the said books, on payment of the sum of one shilling, whether one only or both of the said books shall be searched, and no multiplication of books is to increase the fee." (§ 8.)

"That whenever a *quietus* shall be obtained by a debtor or accountant to the crown, and an office copy thereof shall be left with the senior Master of the said Court of Common Pleas, together with a certificate, signed by the Accountant-General, that the same may be registered, the said Master shall forthwith enter the same in the said book of debtors and accountants to the crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such *quietus*, with the date, and shall for any such entry be entitled to a fee of two shillings and sixpence." (§ 9.)

The act then recites, that "It is expedient to make a further provision for the discharge of an estate belonging to a debtor or accountant to the crown, from the claim of the crown in the hands of a purchaser or mortgagee, although the debt or liability shall not be fully discharged;" and therefore enacts, 'That it shall be lawful for the Commissioners of her Majesty's Treasury of the united kingdom of Great Britain and Ireland for the time being, or any three of them, by writing under their hands, upon payment of such sums of money as they may think fit to require into the receipt of her Majesty's Exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to certify that any lands, tenements, or hereditaments, of any such crown-debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, his or their heirs, executors,

administrators, and assigns, wholly exonerated and discharged from all further claims of her Majesty, her heirs or successors, for or in respect of any debt, claim, or liability, present or future, of the debtor or accountant to whom such lands, tenements, or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators and assigns, shall hold so exonerated and discharged, without prejudice to the rights and remedies of the crown, against the reversion of the lands, tenements, or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements, or hereditaments shall respectively be held accordingly, wholly exonerated and discharged as aforesaid, but in the cases of leases, without prejudice as aforesaid." (§ 10.)

"That any such certificate, or the discharge of any such lands, tenements, or other hereditaments, by virtue of this act shall in nowise impeach, lessen, or affect the right or power of her Majesty, her heirs, or successors, to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the crown out of or from any other lands, tenements, or hereditaments which would have been liable thereto, in case no such certificate had been granted and no such discharge had been obtained." (§ 11.)

9. The Common Pleas' Office is sometimes searched for any certificates of acknowledgments by married women of their conveyances, which must be there inrolled, pursuant to the 3 and 4 Wm. IV. c. 74, §§ 79—91, and the rules of the Court of Hilary and Trinity Terms, A. D. 1834.

Certificates of married women's acknowledgments.

10. Since it is presumed that every one is attentive to the proceedings in our courts of law, there exists a rule, that a person who purchases an estate actually and not collusively in litigation in equity, although he gives a valuable

Doctrine of lis pendens—2 and 3 Vict. c. 11.

consideration for it, and is unaffected with notice of the suit, either express or implied, will be bound by the decree in such suit that may be made against the person, from whom he derives his title, as though he had had notice. This is called the doctrine of *lis pendens*, and is based upon a very proper policy,—since it prevents justice being mocked by the transfers of suitors, and checks the purchase of litigated titles. A bill, or perhaps a claim, must be filed, and a subpœna or summons to appear duly served, before proceedings in Chancery can come under the denomination of a *lis pendens*, which, in order to bind, must be in continued prosecution at the time of the purchase. A decree which puts an end to a suit is not a *lis pendens*, and is, therefore, not of *itself* notice to a purchaser. And since it is but a general notice¹⁷⁰ of an equity, it will not affect a particular person with a fraud, unless he have had express notice of a title in dispute.¹⁷¹

The 2 and 3 Vict. c 11, § 7, enacts, “That no *lis pendens* shall bind a purchaser or mortgagee *without express notice* thereof, *unless and until* a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and the Court of Equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the Senior Master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions hereinbefore contained¹⁷² in regard to the re-

(170) A *lis pendens* is not of itself notice for the purpose of postponing an unregistered deed.

(171) *Vide* 2 Fonblanque on Equity, p. 152; 1 Story's Eq. Jurisp. pp. 325, 326; and 3 Sugd. V. and P. pp. 458—463.

(172) *Vide ante*, p. 627.

entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of *lis pendens* which shall be registered under the provisions of this act."

The Common Pleas office should be searched for any *lites pendentes*, and if any be found, productions of all the proceedings in such pending suit should be required.

11. If the property proposed to be purchased be copyhold, the court rolls of the manor of which such property is parcel should be examined. Copyholds.

12. If the property be freehold or leasehold, and is situated in Middlesex, Yorkshire, Kingston-upon-Hull, or the Bedford-levels, which are the registry-districts of England, the local registers belonging to these places should be investigated, in order to ascertain whether the title-deeds are properly registered, and the estate unincumbered. A purchaser or mortgagor would require all deeds necessary to be registered, to be registered at the expense of the vendor or mortgagor previously to the completion of the conveyance or mortgage; and all incumbrances to be discharged or provided for so as not to prejudice his rights. Register-districts.

13. Sir Edward Sugden lays down¹⁷³ the following propositions, as to what documents should be registered:— Documents requiring registration.

(1.) It is seldom that wills are registered; but a purchaser from a devisee should not complete his contract till the will is duly registered; for if any person were to purchase of the heir at law *bonâ fide*, and without notice of the will, and register his conveyance before the registry of the will, he would be preferred to the purchaser from the devisee.

(2.) But if the vendor be both heir at law and devisee, the non-registry of the will is immaterial; for if he sell to any subsequent purchaser, it must be either in the character of heir at law, or in the character of a devisee. If he sell in this character, the second purchaser must have notice of the will; if he contract in that, the first purchaser has already procured the legal estate.

(173) 2 Vend. and Pur. p. 415.

(3.) So it seems clear, that if the vendor claim a leasehold estate, either as executor or legatee, the purchaser need not insist upon the testator's will being registered, because no subsequent purchaser can procure a title without notice of the will; and it may be remarked, that letters of administration are never registered, and they seem to stand upon the same principle as wills of leasehold estates.

(4.) If a purchaser be already seised of the legal estate, as if he be a mortgagee in fee, and has contracted for the equity of redemption, it is not actually necessary to search the register, if he be assured that notice cannot be proved either on himself, or on any one concerned for him, because the mere registration of deeds is not notice to a purchaser seised of the legal estate previously to the purchase, and he will therefore be entitled to hold against any *puisné* incumbrance of which he had not notice.

Exceptions.

14. The general rule is, that all deeds must be registered under these local acts, even including deeds of appointment under powers; and leases, since their non-registry is not supplied by registering assignments, in which such leases are recited; but assignments of legacies charged upon realty need not be registered.¹⁷⁴ The following interests are excepted:—copyholds, and perhaps leases of copyholds; rack-rent leases; leases not exceeding twenty-one years, where the actual possession and occupation accompany them; and, in Middlesex, chambers in the four Inns of Court; the several Inns of Chancery, and Sergeants' Inn.

Principle of the local register-acts.

15. The principle of these local acts is to invalidate all deeds against any subsequent purchaser or mortgagee, for valuable consideration, unless a memorial of them be duly registered prior to the registry of the memorial of the deed under which such purchaser or mortgagee shall claim.

But it is to be observed, that a mortgagee, having the legal estate, advancing a further loan *without any notice* of a second mortgage duly registered, holds the property

(174) *Malcolm v. Charlesworth*, 1 Kee. 63.

against the mesne mortgagee, till he is repaid the two loans: also a man who purchases and obtains the legal estate *without notice* of a prior equitable incumbrance, properly registered prior to such purchase, is not to be prejudiced by it. But a man purchasing an estate *with notice* of a prior unregistered incumbrance, is bound *in equity* by it, although by the prompt registry of his deed he has obtained priority at law.

In speaking of this last proposition, Sir Edward Sugden¹⁷⁵ says:

“The intention of the act was to secure subsequent purchasers and mortgagees against *prior secret conveyances and fraudulent incumbrances*; and therefore, where a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced; for he can be in no danger where he knows of another incumbrance; because he might then have stopped his hand from proceeding, and therefore is not a person whom the statutes meant to relieve. But of course notice of a prior unregistered instrument is unimportant *at law*. The first registered instrument must prevail at law. It will occur to the learned reader, that although the prior purchaser would, in a case of this nature, be relieved against the subsequent sale, yet the legal estate will be vested in the subsequent purchaser by force of the statute.

“It is evident that a purchaser may be bound by a deed, although not registered; but it is equally clear, that it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situations of the persons having the prior deed; and knowing that registered, in order to defraud them of that title he knew at the time was in them. Apparent fraud, *or clear and undoubted notice*, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the Court in breaking in upon an act of parliament.”

Entailed
estates.

16. In the case of an entailed estate, and there exists a suspicion of a suppressed deed, the Inrolment Office of the Court of Chancery should be searched for disentailing assurances, there to be registered pursuant to the 3 and 4 Wm. IV. c. 74.

Annuities.

17. Occasionally, a search for memorialised annuities is made in this Court; but, in practice, this is very rare, since the memorial does not disclose the property charged, and confers no priority.

Bankruptcy
—12 and 13
Vict. c. 106.

18. If the vendor or mortgagor be a trader subject to the bankrupt laws, then, if there be any the slightest doubt of his perfect credit, a search should be instituted for any proceedings in bankruptcy against him in the inrolment office of the Court of Bankruptcy in the city of London.

The 12 and 13 Vict. c. 106, § 184, enacts:—"That no creditor having security for his debt, or having made any attachment in London or in any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon any mortgagee of or lien upon any part of the property of such bankrupt before the date of the *fiat* or the filing of a petition for adjudication of bankruptcy:

"Provided always, that nothing herein contained shall be deemed to give validity to any warrant of attorney, cognovit, or consent to a judge's order declared to be null and void by any provision of this act,¹⁷⁶ nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or consent, or to any execution or extent executed or levied under or by virtue of any such warrant of attorney, cognovit, or consent."

With respect to transactions with the bankrupt, and ex-

ecutions against his property, up to the time of the bankruptcy, or within a limited time previously thereto, this Act enacts, " that all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before date of the *fiat*, or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bonâ fide* made to any bankrupt before the date of the *fiat* or the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the date of the *fiat* or the filing of such petition, and all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date of the *fiat* or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bonâ fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure and sale before the date of the *fiat* or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed.

" Provided also, that nothing herein contained shall be deemed or taken to give validity to any payment, or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment or a warrant of attorney or

cognovit actionem or judge's order obtained by consent given by any bankrupt by way of fraudulent preference. (§ 133.)

“ No purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a *fiat* or petition for adjudication of bankruptcy shall have been sued out or filed within twelve [calendar] months after such act of bankruptcy.” (§ 134.)

Insolvency—
1 and 2 Vict.
c. 110.

19. The Insolvent Debtors' Court in Portugal Street, Lincoln's Inn Fields, should be searched for petitions, &c. and warrants of attorney given pursuant to 1 and 2 Vict. c. 110, §§ 37, 45, 46, 49, 87, and 92.¹⁷⁷

Time for
making these
searches.

20. All these searches should be postponed to the last practicable moment previously to the execution of the conveyance; for a judgment or deed, may be registered after a search and before the completion of the purchase or mortgage. By shortening the space between the search and the conveyance, this probability is very much diminished.

(177) Take the following incident (given in 1 Sweet's Jarm. Bythe. p. 104,) showing the danger of neglecting to search the office of the Insolvent Debtors' Court. A person purchased a freehold house, which the vendor claimed by devise from his father, and of which he was in possession. The title was apparently well deduced, the conveyance executed, and possession delivered on the payment of the purchase money, and on the day following the completion of the purchase, the purchaser received notice from the vendor's assignee claiming the property under the Insolvent Debtors' Act, of which act the vendor had taken the benefit. Considering the exact point of time at which this claim was set up, and some other circumstances, there was strong reason to suppose that the assignee had designedly placed it in the power of the vendor to commit a fraud; but no distinct evidence of this could be adduced, nor, if proved, would it have enabled the purchaser to retain the property.

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